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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED AIR LINES, INC.,

Petitioner,

vs.

THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA and THE OCCUPATIONAL SAFETY & HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner United Air Lines, Inc. (hereinafter, "United") respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 2, 1980, in Case No. 79-4489, *United Air Lines, Inc.* v. *The Division of Industrial Safety of the Department of Industrial Relations of the State of California and the Occupational Safety and Health Appeals Board for the State of California.*[1]

QUESTION PRESENTED FOR REVIEW

Whether the U. S. Court of Appeals erred in reversing the U. S. District Court and in denying jurisdiction notwithstanding the federal question explicitly stated in United's complaint for declaratory and injunctive relief from pervasive and unlawful regulation of its operations and maintenance facilities by a California state agency when jurisdiction over the same facilities is actively exercised by the Federal Aviation Administration.[2]

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[1] The Division of Industrial Safety will hereinafter be referred to as the "Division," and the Occupational Safety and Health Appeals Board will be referred to as the "Board." Collectively, these agencies will be referred to as "CAL/OSHA."

[2] The only party to the proceeding before the Ninth Circuit which is not revealed by the caption is the International Association of Machinists, District 141, which union filed a brief in the Court of Appeals as *amicus curiae.*

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OPINIONS BELOW

The order of the United States District Court for the Northern District of California (Williams, J.) granting United's motion for a preliminary injunction on July 26, 1979, is not officially reported. A copy appears in the Appendix at page

43a. The Opinion of the United States Court of Appeals for the Ninth Circuit, dated December 2, 1980, is reported at 633 F. 2d 814. A copy appears in the Appendix at page 48a.

JURISDICTION

The judgment of the U. S. Court of Appeals was entered December 2, 1980. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Federal Aviation Administration (FAA)

Federal Aviation Act of 1958, as amended

49 U. S. C. § 1421(a)
49 U. S. C. § 1425

Federal Aviation Regulations

14 C. F. R. § 43.13(a)
14 C. F. R. § 121.133
14 C. F. R. § 121.135

Federal Occupational Safety and Health Administration (FED/OSHA)

Federal Occupational Safety and Health Act of 1970

29 U. S. C. § 651(b)
29 U. S. C. § 653(b)(1)
29 U. S. C. § 667

California Division of Industrial Safety and Occupational Safety and Health Appeals Board (CAL/OSHA)

California Labor Code § 6303(a)
California Labor Code § 6307

STATEMENT OF THE CASE

This civil action involves United's challenge to CAL/OSHA's pervasive inspection, regulation and enforcement of occupational safety and health standards in a manner which usurps the jurisdiction of the Federal Aviation Administration (FAA). CAL/OSHA's authority is limited, not only by its derivation from FED/OSHA's[3] basic statutory grant, but also, under the terms of its own organic statute, by the FAA's exercise of its statutory authority in the same place of employment.

On May 9, 1979, United filed a complaint (Appendix p. 14a) and a motion for a preliminary injunction (Appendix p. 25a) prohibiting the Division from inspecting, regulating or enforcing any jurisdiction over United's San Francisco operations and maintenance facilities.[4] United also filed a motion for a preliminary injunction to enjoin the Board from continuing its administrative proceedings related to the enforcement of citations issued by the Division at United's operations and maintenance facilities (*Id*). On July 26, 1979, the U. S. District Court granted United's motion and entered the preliminary injunction. (Appendix page 43a). CAL/OSHA noticed its appeal on August 6, 1979 and filed a motion for a stay of the preliminary injunction on October 29, 1979. The U. S. Court of Appeals for the Ninth Circuit granted the stay on January 25, 1980, and after briefs and oral argument, reversed the District

[3] Federal Occupational Safety and Health Administration.

[4] United's San Francisco operations and maintenance facilities include only those areas at San Francisco International Airport and United's Maintenance Operation Center at the airport where inspection, servicing and overhaul of aircraft, aircraft engines, propellers and appliances take place. See 49 U. S. C. § 1421(a)(3).

Court on December 2, 1980 (633 F. 2d 814, Appendix p. 48a) holding that the District Court lacked subject matter jurisdiction under 28 U. S C. § 1331 for want of a federal question.[5]

United asserts that the federal questions presented in the complaint are not only the primary issues to be resolved but in addition so dominate the entire action as to require a federal court to hear them. Indeed, the Court of Appeals acknowledged the existence of a federal issue as to the scope of FAA authority but held that the issue is merely "tangential to the task of construing the state statute." 633 F. 2d at 816, Appendix p. 51a. Basic principles of federal jurisdiction vis-a-vis a state agency should not be so readily discarded.

[5] The Court of Appeals failed even to discuss whether jurisdiction might be found under 28 U. S. C. § 1337 also relied upon by United in paragraph 2 of the complaint (Appendix p. 15a).

ARGUMENT

By the Federal Aviation Act of 1958, Congress conferred upon the FAA exclusive authority over safety in air commerce. That authority has always been used by the FAA to require, *inter alia*, that airline personnel perform maintenance on aircraft and aircraft components safely and in accordance with FAA approved manuals of procedures and safeguards. United is subject to the Federal Aviation Act.

In the Occupational Safety and Health Act of 1970, Congress gave pre-emptive authority over employee safety and health to FED/OSHA except for those working conditions over which another federal agency has and exercises safety and health jurisdiction. In *Northwest Airlines, Inc.*, 1980 CCH OSHD, para. 24,751 (appeal pending) (Appendix p. 54a), the FED/OSHA Review Commission held that FED/OSHA lacked safety and health jurisdiction to regulate an airline's employees performing maintenance on an aircraft engine because the FAA has and exercises that authority.

One section of the Occupational Safety and Health Act authorizes FED/OSHA to delegate to a state its safety and health jurisdiction under a plan approved by FED/OSHA. 29 U. S. C. § 667. CAL/OSHA operates under such a plan. CAL/OSHA's authority is, therefore, wholly derived from FED/OSHA's delegation and, in accordance with the federal statutory scheme, cannot exceed FED/OSHA's own jurisdiction. Under its own organic statute, CAL/OSHA's jurisdiction over places of employment in California does not extend to places of employment which are regulated in matters of safety and health by a federal agency much as the FAA. California Labor Code § 6303(a). Nevertheless, CAL/OSHA has continually asserted its safety and health jurisdiction over United's operations and maintenance facilities.

United brought this action for declaratory and injunctive relief against CAL/OSHA's usurpation of FAA authority. The District Court ordered preliminary injunctive relief; however, the Court of Appeals dismissed the action stating there was no federal question. In doing so, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 17 of the U. S. Supreme Court Rules. Moreover, the Court ignored United's allegation that its right to due process was unconstitutionally violated by illegal inspection and regulation in conflict with the Seventh Circuit's decision in *Weyerhaeuser Co.* v. *Marshall,* 592 F. 2d 373, 376 n.2 (7th Cir. 1979). The Court's decision would compel United to bear the heavy burden of unlawful regulation while pursuing piecemeal review of individual citations in the state courts. That decision would likewise leave to the California state courts the obligation to measure the competing jurisdictions of federal agencies and CAL/OSHA at the same time other federal courts will be considering the identical issue of jurisdictional boundaries between other federal agencies and FED/OSHA. Inconsistent adjudication of this important question is inevitable. The Court of Appeals has thus wrongly denied United access to the federal court for comprehensive declaratory and injunctive relief based on federal law.

I.

THE MEASURE OF CAL/OSHA'S JURISDICTION DEPENDS ENTIRELY ON FEDERAL LAW

The Court of Appeals' holding that United's complaint fails to state a federal question is directly contradicted by the nature of the controversy between United and the state agency and the need to resolve that controversy in accordance with the federal statutory scheme.

A. CAL/OSHA's Jurisdictional Limits Cannot Exceed FED/OSHA's

In enacting the Occupational Safety and Health Act of 1970 (OSH Act), Congress intended to provide a comprehensive, nationwide approach to matters of employee safety and health. 29 U. S. C. § 651(b); S. Rep. No. 91-1282, 91st Cong., 2d Sess. 18 (1970) printed in U. S. Code Cong. & Admin. News 1970, pp. 5177, 5180. Nevertheless, Congress also expressed concern that the OSH Act not result in the complete federalization of occupational safety but that the states have the option to "reassume responsibility" for occupational safety and health through the submission of an accpetable plan to the Secretary of Labor. 29 U. S. C. § 667; *American Federation of Labor et al.* v. *Marshall,* 570 F. 2d 1030, 1033 (D. C. Cir. 1978). In other words, after finding that the nation's workforce in general was not adequately protected, Congress assigned the role of comprehensive regulation of safety and health standards to the federal government in the form of the Occupational Safety and Health Administration (FED/OSHA]. States were permitted to reassume responsibility only under the careful scrutiny of FED/OSHA.

Since the Congressional purpose and policy of the OSH Act is to protect every working man and woman in the nation within the constitutional limits of interstate commerce, 29 U. S. C. § 651, not already protected by other federal agencies, 29 U. S. C. § 653(b)(1), the jurisdictional reach of the OSH Act into the interstate commerce of United and other employers cannot be exceeded by the jurisdictional reach of an approved state plan.[6] Accordingly, any jurisdictional limitations placed

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[6] United is not unmindful of the mandate of 29 U. S. C. § 667(c)(2) that state plans require standards which are or will be at least as effective in providing safe and healthful employment and places of employment as federal standards. Authorization to impose more demanding standards, however, does not suggest any broadening of jurisdiction.

on FED/OSHA in its own enabling legislation must likewise apply to any state agency which derives its authority in this federally pre-empted field of occupational safety and health entirely from the approval of the federal agency. CAL/OSHA's jurisdictional limitation in the face of the FAA's exercised jurisdiction is therefore mandated by CAL/OSHA's charter under 29 U. S. C. § 667.

B. Both FED/OSHA and CAL/OSHA Only Have Jurisdiction Over Safety and Health Matters Which Are Not Regulated by Other Agencies

In order to carry out its broad statutory purpose, Congress gave FED/OSHA exceedingly broad regulatory authority in matters of employee safety and health. 29 U. S. C. § 651. That jurisdiction has boundaries, however, which avoid any intrusion into areas already regulated by another federal agency:

> "Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U. S. C. § 653(b)(1).

In 1976, three Circuit Courts considered the railroads' charges that the authority of the Federal Railroad Administration (FRA) pre-empted FED/OSHA from any safety and health regulation in the entire railroad industry. In *Southern Ry. Co.* v. *Occupational Safety and Health Review Commission,* 539 F. 2d 335 (4th Cir. 1976), the Court held that an actual exercise of statutory authority by another federal agency is required before the pre-emption of FED/OSHA is effected. The Court understood, however, that the term "working conditions" in the exemption refers to "the environmental area in which an employee customarily goes about his daily tasks," and that "when another agency has exercised its statutory authority to prescribe standards affecting occupational safety or health for such an area, the authority of the Secretary of Labor is foreclosed." 539 F. 2d at 339.

The Fifth Circuit agreed. In *Southern Pacific Transportation Co.* v. *Usery*, 539 F. 2d 386 (5th Cir. 1976), that Court also rejected the notion that an entire industry can be pre-empted from FED/OSHA regulation merely by the existence of safety and health regulatory authority in the FRA. Once again, however, the Court acknowledged:

> "Section 4(b)(1) [29 U. S. C. 53(b)(1)] means that any FRA exercise directed at a working condition—defined either in terms of a 'surrounding' or a 'hazard'—displaces OSHA coverage of that working condition." 539 F. 2d at 391.

Likewise, in *Baltimore and Ohio R.R. Co.* v. *Occupational Safety and Health Review Commission*, 548 F. 2d 1052, 1055 (D. C. Cir. 1976), the Court held that the FRA, which had only proposed applicable rulemaking, had not yet exercised its statuory authority with enough force to terminate FED/OSHA's authority. But once the FRA were to do so, the Court left no doubt that it understood Congress to intend a pre-emption. The Court also alluded to the situation now facing United:

> "An industry caught in the middle by this approach has, at the least, every right to expect that, until the final boundaries are defined, there will be sensible cooperation and mutual adjustment between the various agencies involved."

United, caught in the middle, has not benefited from any such cooperation or adjustment between agencies.

Simply stated, FED/OSHA has all the safety and health regulatory jurisdiction not held and used by another federal agency. CAL/OSHA's regulatory jurisdiction is similarly limited by the terms of its organic statute.[7] CAL/OSHA's jurisdiction extends to every place of employment in California. California Labor Code § 6307. However, "place of employment" is defined to mean:

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[7] This statutory limitation is compelled by CAL/OSHA's derivation of authority from FED/OSHA under 29 U. S. C. § 667. See *supra*.

> "... any place and the premises appurtenant thereto, where employment is carried on, *except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any* state or *federal agency* other than the Division [of Industrial Safety]." California Labor Code § 6303(a) (Emphasis added.)

Thus, like its federal counterpart from which it derives its authority, CAL/OSHA may not regulate where another federal agency already has and exercises safety and health jurisdiction. In this action, the District Court found that the FAA has and exercises safety and health jurisdiction over United's San Francisco operations and maintenance facilities. The Court therefore enjoined CAL/OSHA from regulating in the same place of employment. (Appendix p. 46a) Since CAL/OSHA's jurisdiction is derived from federal law and must be measured by interpretation of another federal agency's jurisdiction, its authority was properly limited by the District Court. In reversing the District Court, the Court of Appeals simply ignored the federal questions of statutory construction and due process explicitly presented in the complaint.

C. The Scope of FAA Regulation Is Determined by The Interpretation of The Federal Aviation Act and Its Implementing Regulations

The California statute, no less than the federal law, effectuates the Congressional purpose of avoiding overlapping jurisdiction over employee safety and health. Avoiding OSHA interference, whether federal or state, depends entirely on a measurement of the "other agency's" authorized jurisdiction and a determination of whether that jurisdiction is actually exercised. For United, its regulation by either FED/OSHA or CAL/OSHA is determined by the outer limits of the FAA's exercised authority in the field of employee safety and health. This is the ultimate question to be resolved by a federal court in this action and is the essential issue on which United's complaint is based.

Moreover, based on the applicable law and recent interpretation of that law, it appears that United's position concerning the effect of FAA jurisdiction is correct.

The FAA, acting through its Administrator, has been given virtually absolute authority to carry out its responsibilities as set forth in the Federal Aviation Act. 49 U. S. C. § 1341(a).[8] Those powers and duties are described at 49 U. S. C. § 1421(a) to include the following:

> "The [Federal Aviation] Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> * * *
>
> (3) *Reasonable rules and regulations and minimum standards governing, in the interest of safety, (a) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances;* (b) the equipment and facilities for such inspection, servicing and overhaul; and (c) in the discretion of the Administrator, the periods for, and the manner in which such inspection, servicing and overhaul shall be made, including provisions for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may expect in lieu of those made by its officers and employees. . . .
>
> * * *
>
> (6) "*Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commence.*" (Emphasis added.)

United, as a domestic flag carrier, is subject to FAA regulations, 49 U. S. C. § 1371, and, as such, is required to

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[8] "In the exercise of his duties and the discharge of his responsibilities under this chapter, the Administrator shall not submit his decision for the approval of, nor be based on the decisions of recommendations of any committee, board, or other organization created by Executive Order." 49 U. S. C. § 1341(a).

inspect, maintain, overhaul and repair its own equipment in accordance with the Federal Aviation Act and the rules, regulations and standards issued thereunder by the FAA. 49 U. S. C. § 1425(a). For its part, the FAA is obligated to ensure that these things are done in a safe work environment. 49 U. S. C. § 1425(b). Its inspectors see that this is done at United. See Applegate and Asvitt Affidavits (Appendix pp. 280 and 41a).

In order to carry out its obligations, the FAA prescribes and enforces safety and health standards through the promulgation of comprehensive Federal Aviation Regulations ("FARs"), as explained in the FAA basic Organization Structure, Part 1, Chapter (3)(a):

> "The promulgation of safety regulations is provided for under Title VI of the (Federal Aviation) Act. These regulations provide for the examination, inspection, certification (including medical) and rating of airmen, and the administration of regulations and surveillance of related activities. Under this title, the Agency develops regulations for promulgation by the Administrator on *all safety matters relating to* manufacture, operation and *maintenance of aircraft;* performs flight inspections of air navigation facilities in the United States and, as required, abroad; *and provides for enforcement of the safety-regulations."* (Emphasis added.) 30 *Federal Register* 3395, March 10, 1965.

The FAA also exercises its authority by requiring that each air carrier develop extensive and detailed manuals "for the use of its flight and grounds operation personnel in the performance of their duties." 14 C. F. R. Part 121, Subpart G. The FAA specifically requires that:

> "(a) Each domestic flag air carrier shall prepare and keep current a *manual* for the use and guidance of flight and *ground operations* personnel in conducting its operations." (Emphasis added.) 14 C. F. R. § 121.133.

The safety and health requirements found in the manuals must meet the FAA regulatory standards and must be "acceptable to the administrator." *See,* 14 C. F. R. § 43.13(a). The FAA specifies that each manual must include:

"(1) *Instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety:*

(b) (16) Instructions and procedures for maintenance, preventive maintenance, and servicing.

(24) *Other information or instructions relating to safety.*" (Emphasis added.) 14 C. F. R. § 121.135.

The submission of these manuals by the air carrier and the acceptance of them by the FAA constitutes compliance with the FAA requirements:

"(c) *Special provisions for air carriers and commercial operations.* Unless otherwise notified by the Administrator, the methods, techniques and practices contained in the maintenance manual or the maintenance part of the air carrier manual or a certificated air carrier or commercial operator . . . constitute acceptable means of compliance with this section." (Emphasis added.) 14 C. F. R. § 43.13(c).

United complies with these FAA safety regulations by developing and submitting, in accordance with the foregoing authorities, its manuals to the FAA and by enforcing the provisions contained therein (see Affidavit of Willson C. Applegate, Appendix, p. 29a). The breadth and scope of those manuals, all of which have been accepted by the FAA (see Applegate Affidavit, Appendix, p. 29a), are illustrated by the Safety Index taken from United's Regulation 5-12, a copy of which is attached as Exhibit A to the Applegate Affidavit. (Appendix p. 33a). In summary form, this Index shows that the manuals cover virtually every item of workplace safety which can possibly affect the employees at United's operations and maintenance facilities.

Not only does United's own safety staff monitor compliance with the safety and health standards contained in the manuals (Applegate Affidavit, Appendix p. 29a), but also the FAA has assigned two principal maintenance operations in-

spectors and a staff of eight other inspectors to United's San Francisco facilities to enforce the standards contained in United's manuals (Affidavit of Clifford Asvitt, Appendix, p. 41a).[9] The FAA's close involvement with the safety and health of United's ground employees is an obvious corollary to its concern for the safety of passengers and crews on aircraft in flight. It is inherently contradictory and fraught with risk to hold—as does the CAL/OSHA Board—that a ground employee performing a maintenance task on an airplane or one of its components should face regulation by the FAA for the effect of that maintenance procedure on the airplane or component and regulation by CAL/OSHA (or in other states FED/OSHA) for the effect of that same maintenance procedure on his own safety. Congress did not intend such a split of regulatory authority over a single task. To the contrary, Congress plainly intended that FAA regulation such as is present here would foreclose FED/OSHA jurisdiction.

The jurisdictional reach of CAL/OSHA is no different. It derives its jurisdiction solely from FED/OSHA (29 U. S. C. § 667) and its organic statute similarly claims only residual statutory authority over places of employment not regulated by another agency such as the FAA.

D. The Court of Appeals' Failure to Find a Federal Question as to the Scope and Exercise of FAA Jurisdiction in Matters of Safety and Health Encourages Inconsistent Federal/State Adjudication of the Same Issue

The Occupational Safety and Health Review Commission ("OSHRC" or "Commission") has recently considered the question of FAA pre-emptive jurisdiction. In *Northwest Airlines,* 1980 CCH Employment Safety and Health Guide para. 24,751 (Appeal pending) (See Appendix p. 54a), the Commission ruled that a reasonable interpretation of 49 U. S. C.

[9] Respondent Division has never challenged the accuracy of United's affidavits submitted in support of United's motion for a preliminary injunction. Nor could they.

§ 1421(a) would render it applicable to working conditions of an airline's maintenance personnel to ensure their safety as an integral part of the FAA's obligation to ensure "safety of air commerce" (Appendix p. 70a). The Commission then summarized its well-reasoned opinion:

> "In summary, we conclude that the FAA possesses the statutory authority to regulate the health and safety of airline maintenance personnel and that the FAA has validly exercised this authority, through duly promulgated rules that require airlines to develop, subject to FAA disapproval, manuals that include provisions designed to further the safety of such personnel. Since Northwest's manual requires the airline to comply with a procedure to lock out the wing flaps while an employee is changing the landing lights on a Boeing 747, then section 4(b)(1) of the Act precludes the Secretary from citing Northwest with respect to any hazards allegedly arising out of such activities." (Appendix p. 80a)

In virtually an identical situation, United sought review by the CAL/OSHA Board of a citation issued to United for failure to use a guardrail on a platform while performing maintenance on the tail engine of a DC-10 aircraft.[10] A safety harness or guardrail was required by United's manual. Yet, United's argument that the FAA has pre-emptive jurisdiction has been rejected both by the Board and by the reviewing Superior Court for the City and County of San Francisco.[11]

Each and every time the issue of the FAA's active exercise of jurisdiction over the safety and health of ground employees has been considered by the OSHRC, either the full Commission or its administrative law judge has found that FED/OSHA lacked jurisdiction because of the pre-emptive effect of the

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[10] This proceeding is described in para. 12 of United's complaint (Appendix pp. 18a-19a).

[11] *United Air Lines, Inc.* v. *The Occupational Safety and Health Appeals Board, et al,* Docket No. 747-454, Judgment entered October 27, 1980 (Appeal to the California Court of Appeal pending).

active exercise of FAA jurisdiction.[12] Yet, because of the CAL/OSHA Board's refusal to reach the same result, United continues to be faced with repeated inspections and regulation by CAL/OSHA at its San Francisco operations and maintenance facilities at the same time the FAA inspects and regulates the same facilities. It was to obtain a comprehensive and definitive federal ruling as to the pre-emptive effect of FAA jurisdiction that United brought its action in the District Court. The Court of Appeals frustrated that effort by its failure to find a federal question.

II.

THE COURT OF APPEALS SIMPLY IGNORED UNITED'S COMPLAINT

The U.S. Court of Appeals failed to consider the federal issues alleged in United's complaint when it held that: "Jurisdiction does not appear in plaintiff's complaint in this case." 633 F. 2d at 815 (Appendix p. 50a). In its complaint, United set forth the statutory pattern described *supra.* United then alleged that dual, confusing and conflicting regulation subjected United to unlawful regulation by CAL/OSHA. United further alleged that such unlawful regulation of the conduct of its business as an air carrier deprives United of its property rights without due process of law. Complaint, para. 15-20, (Appendix pp. 20a-21a). If United is correct that the FAA's exercise of its authority in matters of safety and health denies CAL/OSHA of such jurisdiction, the Circuit Court's ruling that no federal question of due process is raised by the complaint is clearly wrong.

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[12] See *Northwest Airlines, supra; Secretary of Labor* v. *American Airlines,* 1975-76 CCH OSHD para. 20,129 (1975); *Secretary of Labor* v. *American Airlines,* OSHRC Docket No. 78-0918 (pending review); Cf. *Secretary of Labor* v. *Consolidated Rail Corp.,* CCH OSHD para. 23,363 (1979); *Mushroom Transportation Co.,* 1973-74 CCH OSHD para. 16,881 (1974).

Moreover, the Circuit Court's exclusive focus on the alleged defensive nature of this action is misdirected. This action is not so narrowly limited to defending against CAL/OSHA's citations.[13] As stated in the complaint, it is the entire regulatory process of CAL/OSHA to which United objects as beyond legal limits.[14] United sought to have the federal question resolved once and for all in the context of its ongoing dispute with CAL/OSHA. At bottom, it is the need for declaratory and injunctive relief from regulation, not defenses to citations, which has occasioned this suit.

The U. S. Court of Appeals for the Seventh Circuit has twice recognized that abuse of regulatory power by FED/OSHA can and should be enjoined by a federal court. In *Weyerhaeuser Co.* v. *Marshall,* 592 F. 2d 373 (7th Cir. 1979), the Court looked beyond the customary need to exhaust administrative remedies before ordering relief from unlawful regulation. The Court expressly distinguished between injuries to the employer resulting from illegal inspections and injuries resulting from citations for violations of the Act. It concluded that the employer had a fourth amendment right to conduct its business free of unreasonable administrative inspections. 592

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[13] The Court's reference to cases in which the federal question appears in the complaint only as an anticipated reply to a defense or as a defense to an impending action is clearly misplaced. Those cases involve basic state contract or insurance law, but allege federal issues in the complaint only as to the anticipated defenses. In the instant case, the basic jurisdictional conflict between a federal and a state agency needs to be resolved by a federal court, and it is that federal issue which United has presented in its complaint.

[14] The Court held that United's effort to obtain comprehensive relief beyond that available in the state court was without merit, 633 F. 2d at 817 (Appendix p. 53a). It relied on *Moore* v. *Sims,* 442 U. S. 415, 424-27 (1979), an abstention decision. What may be appropriate reasoning for judicial abstention, however, does not provide support for refusing to find jurisdiction based on a federal question. Moreover, at another part of the opinion, the Court expressly declined to consider the issue of abstention. *Id.*

F. 2d at 376 n. 2.[15] It is that same right to be free of unlawful regulation by CAL/OSHA which United seeks to enforce in this action.

The Court in *Continental Can Co.* v. *Marshall,* 603 F. 2d 590 (7th Cir. 1979), also set aside the usual requirement that plaintiff first exhaust administrative remedies because of the repetitive and harassing nature of FED/OSHA's actions in compelling the employer into numerous administrative hearings. Here too, the injury of repetitive litigation suffered by the employer was distinct and apart from the effect of the citations themselves. Accordingly, the Court held that it had jurisdiction to act to prevent the constitutional injury from continuing. 603 F. 3d at 597 and 597 n. 12.

In *Weyerhaeuser* and *Continental Can,* the Seventh Circuit acted to prevent a continuation of abuses of the regulatory process. In the case presented herein, the Ninth Circuit refused to act despite a demonstrated jurisdictional overlap contrary to federal law.

The Supreme Court has specifically held that rights to due process are to be protected by federal courts. In *State of South Carolina* v. *Katzenbach,* 383 U. S. 301, 325 (1966), the Court reiterated the rule of *Gomillion* v. *Lightfoot,* 364 U. S. 339, 347 (1960):

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. *But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.*" (Emphasis added.)

Congress has granted the FAA plenary authority to regulate safety of air commerce interpreted by the FAA to include the safety and health of airline employees who perform maintenance functions on aircraft and aircraft components. United has a federally protected right to rely on that regulation by the

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[15] Citing *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307 (1978).

FAA at its San Francisco operations and maintenance facilities as intended by Congress. United also has a federally protected right to be free from the unlawful regulation over certain of its facilities by CAL/OSHA. United's rights to federal protection were ignored by the Ninth Circuit.

The federal statutory scheme enacted by Congress carefully distributed authority over employee safety and health between FED/OSHA and other federal agencies. Since CAL/OSHA'S authority is solely derived from that of FED/OSHA, any dispute as to the scope of that authority clearly presents a federal question.

This Court can and should reverse the Court of Appeals.

CONCLUSION

For all the above reasons, petitioner United Air Lines, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this action.

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APPENDIX

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STATUTES AND REGULATIONS

14 C.F.R. § 43.13(a)

(a) Each person maintaining or altering, or performing preventive maintenance, shall use methods, techniques, and practices acceptable to the Administrator. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industry practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.

14 C.F.R. § 121.133

(a) Each domestic and flag air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in conducting its operations.

(b) Each supplemental air carrier and commercial operator shall prepare and keep current a manual for the use and guidance of flight, ground operations, and management personnel in conducting its operations.

(c) For the purpose of this subpart, the certificate holder may prepare that part of the manual containing maintenance information and instructions, in whole or in part, in printed page form or microfilm.

14 C.F.R. § 121.135

(a) Each manual required by § 121.133 must—

(1) Include instructions and information necessary to allow the personnel concerned to perform their duties and responsibilites with a high degree of safety;

(2) Be in a form that is easy to revise;

(3) Have the date of last revision on each page concerned; and

(4) Not be contrary to any applicable Federal regulation and, in the case of a flag or supplemental air carrier, any applicable foreign regulation, or the certificate holder's operations specifications or operating certificate.

(b) The manual may be in two or more separate parts, containing together all of the following information, but each part must contain that part of the information that is appropriate for each group of personnel;

(1) General policies.

(2) Duties and responsibilities of each crewmember and appropriate members of the ground organization and in the case of supplemental air carriers and commercial operators, management personnel.

(3) Reference to appropriate Federal Aviation Regulations.

(4) Flight dispatching and operational control, including procedures for coordinated dispatch or flight control or flight following procedures, as applicable.

(5) En route flight, navigation, and communication procedures, including procedures for the dispatch or release or continuance of flight if any item of equipment required for the particular type of operation becomes inoperative or unserviceable en route.

(6) For domestic or flag air carriers, appropriate information from the en route operations specifications, including for each approved route the types of aircraft authorized, the type of operation such as VFR, IFR, day, night, etc., and any other pertinent information.

(7) For supplemental air carriers or commercial operators, appropriate information from the operations specifications, including the area of operations authorized, the types of aircraft authorized, the type of operation such as VFR, IFR, day, night, etc., and any other pertinent information.

(8) Appropriate information from the airport operations specifications, including for each airport—

(i) Its location (domestic and flag air carrier operations only);

(ii) Its designation (regular, alternate, provisional, etc.) (domestic and flag air carrier operations only);

(iii) The types of aircraft authorized (domestic and flag air carrier operations only);

(iv) Instrument approach procedures;

(v) Landing and takeoff minimums; and

(vi) Any other pertinent information.

(9) Takeoff, en route, and landing weight limitations.

(10) Procedures for familiarizing passengers with the use of emergency equipment, during flight.

(11) Emergency equipment and procedures.

(12) The method of designating succession of command of flight crewmembers.

(13) Procedures for determining the usability of landing and takeoff areas, and for disseminating pertinent information thereon to operations personnel.

(14) Procedures for operating in periods of ice, hail, thunderstorms, turbulence, or any potentially hazardous meteorological condition.

(15) Airman training programs, including appropriate ground, flight, and emergency phases.

(16) Instructions and procedures for maintenance, preventive maintenance, and servicing.

(17) Time limitations, or standards for determining time limitations, for overhauls, inspections, and checks of airframes, engines, propellers, appliances and emergency equipment.

(18) Procedures for refueling aircraft, eliminating fuel contamination, protection from fire (including electrostatic protection), and supervising and protecting passengers during refueling.

(19) Airworthiness inspections, including instructions covering procedures, standards, responsibilities, and authority of inspection personnel.

(20) Methods and procedures for maintaining the aircraft weight and center of gravity within approved limits.

(21) Where applicable, pilot and dispatcher route and airport qualification procedures.

(22) Accident notification procedures.

(23) Procedures and instructions relating to the handling of dangerous articles and magnetized materials, if these materials are to be carried, stored, or handled, including:

(i) Procedures for determining the proper shipper certification required by § 103.3 of this chapter, proper packaging, marking, labeling, shipping documents, compatibility of articles, and instructions on the loading, storage, and handling thereof.

(ii) Notification procedures for reporting dangerous article incidents as required by § 103.28 of this chapter.

(iii) Instructions and procedures for the notification of the pilot in command when there are dangerous articles aboard, as required by § 103.25 of this chapter.

(24) Other information or instructions relating to safety.

(c) Each certificate holder shall maintain at least one complete copy of the manual at its principal operations base.

29 U.S.C. § 651(b)

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

(4) by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

(5) by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods,

techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which

procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problems;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

49 U. S. C. § 1421(a)

(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of air craft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interests of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

49 U. S. C. § 1425

(a) It shall be the duty of each air carrier to make, or cause to be made, such inspection, maintenance, overhaul, and repair of all equipment used in air transportation as may be required by this chapter, or the orders, rules, and regulations of the Administrator issued thereunder. And it shall be the duty of every person engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply with the requirements of this chapter relating thereto, and the orders, rules, and regulations issued thereunder.

(b) The Administrator shall employ inspectors who shall be charged with the duty (1) of making such inspections of aircraft, aircraft engines, propellers, and appliances designed for use in air transportation, during manufacture, and while used by an air carrier in air transportation, as may be necessary to enable the Administrator to determine that such aircraft, aircraft engines, propellers, and appliances are in safe condition and are properly maintained for operation in air transportation; and (2) of advising and cooperating with each air carrier in the inspection and maintenance thereof by the air carrier. Whenever any inspector shall, in the performance of his duty, find that any aircraft, aircraft engine, propeller, or appliance, used or intended to be used by any air carrier in air transportation, is not in condition for safe operation, he shall so notify the carrier, in such form and manner as the Administrator may prescribe; and, for a period of five days thereafter, such aircraft, aircraft

engine, propeller, or appliance shall not be used in air transportation, or in such manner as to endanger air transportation, unless found by the Administrator or his inspector to be in condition for safe operation.

29 U. S. C. § 653(b)(1)

(b)(1) Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U. S. C. § 667

(a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in

providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

(d) If the Secretary rejects a plan submitted under subsection (b) of this section, he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

(e) After the Secretary approves a State plan submitted under subsection (b) of this section, he may, but shall not be required to, exercise his authority under sections 657, 658, 659, 662, and 666 of this title with respect to comparable standards promulgated under section 655 of this title, for the period specified in the next sentence. The Secretary may exercise the authority referred to above until he determines, on the basis of actual operations under the State plan, that the criteria set forth in subsection (c) of this section are being applied, but he shall not make such determination for at least three years after the plan's approval under subsection (c) of this section. Upon making the determination referred to in the preceding sentence, the provisions of sections 654(a)(2), 657 (except for the purpose of carrying out subsection (f) of this section), 658, 659, 662, and 666 of this title, and standards promulgated under section 655 of this title, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 658 or 659 of this title before the date of determination.

(f) The Secretary shall, on the basis of reports submitted by the State agency and his own inspections make a continuing evaluation of the manner in which each State having a plan approved under this section is carrying out such plan. Whenever the Secretary finds, after affording due notice and opportunity for a hearing, that in the administration of the State plan there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), he shall notify the State agency of his withdrawal of approval of such plan and upon receipt of such notice such plan shall cease to be in effect, but the State may retain jurisdiction in any case

commenced before the withdrawal of the plan in order to enforce standards under the plan whenever the issues involved do not relate to the reasons for the withdrawal of the plan.

(g) The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary. A copy of such petition shall forthwith be served upon the Secretary, and thereupon the Secretary shall certify and file in the court the record upon which the decision complained of was issued as provided in section 2112 of Title 28. Unless the court finds that the Secretary's decision in rejecting a proposed State plan or withdrawing his approval of such a plan is not supported by substantial evidence the court shall affirm the Secretary's decision. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(h) The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

California Labor Code § 6303(a)

(a) "Place of employment" means any place, and the premises appurtenant thereto, where employment is carried on, except a place the safety jurisdiction over which is vested by law in any state or federal agency other than the division.

California Labor Code § 6307

The division has the power, jurisdiction, and supervision over every employment and place of employment in this state,

which is necessary to adequately enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment.

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IN THE UNITED STATES DISTRICT COURT

For the Northern District of California

UNITED AIR LINES, INC., *Plaintiff,* vs. THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS, OF THE STATE OF CALIFORNIA, and THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA, *Defendants.*	No. C 79-1107 (SW) VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff United Air Lines, Inc. (hereinafter "United") as and for its complaint, respectfully alleges the following:

1. This is an action for declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and an action for preliminary and permanent injunctive relief. Plaintiff United alleges herein that the actions of the defendants are beyond their jurisdictional authority, interfere with and disrupt the federal statutory scheme with respect to safety at United's operations and maintenance facilities at San Francisco International Airport, and violate United's right to due process of law.

2. The jurisdiction of this Court is based on the Federal question raised by the matters alleged in this complaint, 28 U. S. C. § 1331; diversity of citizenship, 28 U. S. C. § 1332; and the Federal preemption which arises by virtue of an Act of Congress regulating commerce, 28 U. S. C. § 1337. The matter in controversy, exclusive of interest and costs, exceeds $10,000.00.

THE PARTIES

3. Plaintiff United is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Illinois. United is qualified to do business within the State of California. United is an air carrier within the meaning of the Federal Aviation Act, 49 U. S. C. § 1301(3).

4. Defendant Division of Industrial Safety of the Department of Industrial Relations of the State of California (hereinafter the "Division"), is now, and at all times relevant hereto has been, the California state agency responsible for enforcing compliance with the California Occupational Safety and Health Act of 1973, enacted as part of the California Labor Code, §§ 148-49, 6300 *et seq.* (hereinafter the "Act").

5. Defendant Occupational Safety and Health Appeals Board for the State of California (hereinafter the "Board"), is

now, and at all times relevant has been, the agency charged with adjudicating and rendering final administrative decisions in disputes arising under the Act.

THE STATUTORY SCHEME OF REGULATION

6. Under the Act, the Division has safety jurisdiction over places of employment as defined therein. The term "place of employment" is defined in Labor Code Section 6303(a) as follows:

> 6303(a) 'Place of employment' means any place, and the premises appurtenant thereto, where employment is carried on, except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division.

7. Section 601 of the Federal Aviation Act of 1958, as amended, 49 U. S. C. § 1412(a), states in pertinent part:

> The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> * * * *
>
> (1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;
>
> (2) Such minimum standards governing appliances as may be required in the interest of safety;
>
> (3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, or air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

8. Section 605(a) of the Federal Aviation Act, 49 U.S.C. § 1425(a) sets forth the duties of each air carrier to inspect, maintain, overhaul and repair its equipment. It states:

605(a) It shall be the duty of each air carrier to make, or cause to be made, such inspection, maintenance, overhaul, and repair of all equipment used in air transportation as may be required by this Act, or the orders, rules and regulations of the Secretary of Transportation issued thereunder. And it shall be the duty of every person engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply with the requirements of this Act relating thereto, and the orders, rules, and regulations issued thereunder.

9. For its part, the Federal Aviation Administration (hereinafter the "FAA") has the responsibility for inspecting air carrier's facilities to insure that inspections and maintenance required under Section 605(a) are properly carried out. Section 605(b), 49 U.S.C. § 1425(b) specifically sets forth that duty. It reads, in pertinent part:

605(b). The Administrator shall employ inspectors who shall be charged with the duty (1) of making such inspections of aircraft, aircraft engines, propellers, and appliances designed for use in air transportation, during manufacture, and while used by an air carrier in air

transportation, as may be necessary to enable the Secretary of Transportation to determine that such aircraft, aircraft engines, propellers, and appliances are in safe condition and are properly maintained for operation in air transportation; and (2) of advising and cooperating with each air carrier in the inspection and maintenance thereof by air carrier.

10. Pursuant to its statutory mandate, the FAA promulgated in Volume 14 of the Code of Federal Regulations a comprehensive code of regulations known as the Federal Aviation Regulations ("FARs"). The FARs require, *inter alia*, that inspection and maintenance on aircraft and aircraft engines, parts and components shall be performed with a high degree of safety in accordance with manuals prepared and kept current by the air carrier and submitted to the FAA. 14 C.F.R. §§ 121.131 *et seq.* The methods, techniques and practices included in the manual and used for such maintenance must be acceptable to the FAA. 14 C.F.R. §§ 43.13; 121.361 *et seq.* Through these implementing regulations, the FAA actively exercises its jurisdiction over the safety of workers at United's aircraft maintenance facilities.

THE CONTROVERSY

11. Notwithstanding the FAA's exercise of its statutory jurisdiction at United's "place of employment" within the meaning of Section 6303(a) of the Labor Code, the Division regularly and repeatedly inspects, regulates and attempts to enforce its alleged jurisdiction over the safety of workers at United's San Francisco operations and maintenance facilities.

12. On June 16 and 17, 1976, a representative of the Division conducted an inspection at United's facility at San Francisco International Airport. As a result of this inspection, a citation was issued which alleged that United's employees were performing maintenance on the number 2 or tail engine of a

DC-10 aircraft from a platform not properly equipped with guardrails in violation of a standard issued under the Act. United contested the issuance of the citation, *inter alia,* on the grounds that aircraft maintenance falls within the actively exercised jurisdiction of the FAA thereby preempting the Division's jurisdiction. Nevertheless, both the Board's Administrative Law Judge and the reviewing Board held that the Division had properly exercised its safety jurisdiction. United has taken an appeal by way of a petition for an alternative writ of mandate filed in the Superior Court of the City and County of San Francisco, which was duly issued on December 26, 1978. In that proceeding, United is challenging the jurisdiction of the Division and the Board. Briefing is now scheduled to be completed by June 8, 1979.

13. On June 27, 1977, the Division issued a citation at United's operations facility at San Francisco International Airport for an alleged violation of a standard issued under the Act in that a number of Phillippine Airlines LD-3 cargo containers being serviced by United pursuant to contract were damaged and posed a hazard to employees. On July 15, 1977, FAA personnel inspected the same operation and ordered United to correct the problem of damaged containers as being contrary to FAA safety rules. Notwithstanding the exercise of FAA jurisdiction over the same problem, and United's contention that the Division lacks jurisdiction, United's protest to the Division citation will be set for a hearing before a Board Administrative Law Judge.

14. As a result of inspections conducted by the Division on July 14, 21, 24-28, 31, 1978 and August 1-4, 1978, a citation was issued against United by the Division for an alleged violation of foot protection standards at United's Maintenance Operations Center at the San Francisco International Airport. The FAA, however, in accepting the manuals required to be filed with it by United, also regulates the type of footwear to be worn by United's personnel. Although the FAA has never

charged United with any violation of safety requirements with regard to footwear, the Division's citation involves standards which are within the actively exercised jurisdiction of the FAA. A hearing before a Board Administrative Law Judge on the Division's foot protection citation was scheduled to begin on April 25, 1979, but has been continued. The jurisdiction of Cal/OSHA will be addressed at the hearing along with the specific challenge to Cal/OSHA's analysis of hazards, if any, to the feet of employees working at 211 separate job functions at United's San Francisco operations and maintenance facilities. Extensive discovery and other preparation will be required of the parties for the hearing, which itself is estimated to last five to ten days. Such preparation will include a major utilization of legal and staff personnel as well as the investment of other resources.

VIOLATIONS OF LAW

15. The instances cited in Paragraphs 12-14 of this complaint are illustrative examples and are not all-inclusive. The Division's regular and repeated inspection, regulation and attempts at enforcement under the Act at United's San Francisco operations and maintenance facilities are beyond its jurisdiction and subject United to dual, confusing and conflicting state and Federal regulation over the safety of its workers contrary to the statutory scheme and in violation of United's rights to due process of law.

16. The Board's decisions which confirm the Division's assertion of safety jurisdiction over United's San Francisco operations and maintenance facilities are contrary to the Act and encourage the continued exercise of jurisdiction by the Division over United's facilities in violation of the Act.

17. The continued exercise by the Division of jurisdiction over the safety of workers at United's San Francisco operations and maintenance facilities subjects United to multiple and

excessive litigation before the Board, a State of California administrative agency, involving a Federal question, to wit, the extent of FAA jurisdiction and its preemptive effect under the Act. This unnecessary involvement in litigation constitutes undue harassment in United's conduct of its business as an air carrier and deprives United of its property rights without due process of law.

18. The violations of law described in Paragraphs 15 through 17 of the Complaint have caused, and, unless enjoined, will continue to cause United to suffer immediate and irreparable injury for which there is no adequate remedy at law because of the enormous expenditure of resources required to comply with or defend against the unlawful inspection, regulation and enforcement of the Division's asserted safety jurisdiction over the San Francisco operations and maintenance facilities in addition to the properly exercised and conflicting safety jurisdiction of the FAA over the same facilities.

19. The violations of law described in Paragraphs 15 through 17 of this Complaint have caused, and, unless enjoined, will continue to cause United to suffer immediate and irreparable injury for which there is no adequate remedy at law because of the enormous expenditure of resources required to participate in individual inspections by the Division and to litigate the individual citations issued by the Division and heard by the Board.

20. The matters raised in this Complaint involve questions of statutory interpretation of Federal and state laws for which there is no adequate administrative remedy. Moreover, no particular administrative expertise or further development of an administrative record is necessary to resolve either the statutory questions or the constitutional issue as to whether the Division's and Board's exercise of their alleged jurisdiction violates United's rights to due process under the law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff United Air Lines, Inc. prays that the Court:

a. Enter a declaratory judgment holding that United's San Francisco operations and maintenance facilities are not places of employment within the meaning of the California Occupational Safety and Health Act of 1973, as amended, Labor Code Section 6303(a) by virtue of the safety jurisdiction actively exercised by the Federal Aviation Administration pursuant to Sections 601 and 605 of the Federal Aviation Act of 1958, as amended, 49 U. S. C. §§ 1421(a) and 1425.

b. Enter a preliminary injunction until a full hearing on this cause can be held, and thereafter, enter a permanent injunction restraining and enjoining defendant, the Division of Industrial Safety of the Department of Industrial Relations of the State of California, its officers, employees and agents, from inspecting, regulating or enforcing any jurisdiction over United's San Francisco operations and maintenance facilities.

c. Enter a preliminary injunction until a full hearing on this cause can be held, and thereafter, enter a permanent injunction restraining and enjoining defendant Occupational Safety and Health Appeals Board of the State of California, its officers, employees and agents, from continuing any proceedings related to the enforcement of citations issued by the Division for safety violations at United's San Francisco operations and maintenance facilities.

d. Enter an order awarding plaintiff United Air Lines, Inc. its costs of this suit pursuant to 28 U.S.C. §2412; and for such other and further relief as the Court shall deem appropriate in the premises.

Paul M. Tschirhart
Paul M. Tschirhart
Robert H. Brown

Jean C. Gaskill
Jean C. Gaskill
Kathleen Lucas-Wallace
Brobeck, Phleger & Harrison

Attorneys for Plaintiff,
United Air Lines, Inc.

Of Counsel:
Philip J. Hogan
General Counsel
United Air Lines, Inc.

VERIFICATION

STATE OF CALIFORNIA }
COUNTY OF SAN MATEO } ss.:

Ralph T. Glasson, being first duly sworn, deposes and says that he is an officer, to wit: Vice President of Maintenance Administration, United Air Lines, Inc., a corporation organized and existing under the laws of the State of Delaware and duly qualified to do business in California and the plaintiff herein; that he has read the foregoing complaint of plaintiff United Air Lines and that he is informed and believes the matters stated therein to be true and on that ground alleges that the matters stated therein are true.

Executed this 7th day of May, 1979, in the County of San Mateo, State of California.

Ralph T. Glasson
Ralph T. Glasson

Subscribed and sworn to before me
this 7th day of May, 1979.

Rodger E. Simonian
Notary Public—State of California

PAUL M. TSCHIRHART
ROBERT H. BROWN
UNITED AIR LINES, INC.
P. O. Box 66100
Chicago, Illinois 60666
(312) 952-4192

JEAN C. GASKILL
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San Francisco, California 94105
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Attorneys for Plaintiff,
United Air Lines, Inc.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of California

UNITED AIR LINES, INC.,
Plaintiff,

vs.

THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS, OF THE STATE OF CALIFORNIA,

and

THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA,
Defendants.

No. C 79-1107 (SW)

NOTICE OF MOTION AND MOTION OF UNITED AIR LINES FOR A PRELIMINARY INJUNCTION

STATE OF CALIFORNIA
COUNTY OF SAN MATEO } ss.:

TO: DEFENDANTS THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA AND THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that on June 1, 1979, at 10 a.m., or as soon thereafter as counsel can be heard, plaintiff United Air Lines ("United") through counsel, and pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, will and does hereby move this Court for an order:

(a) restraining and enjoining, *pendente lite,* defendant, the Division of Industrial Safety of the Department of Industrial Relations of the State of California, its officers, employees and agents, from inspecting, regulating or enforcing any jurisdiction over United's San Francisco operations and maintenance facilities.

(b) restraining and enjoining, *pendente lite,* defendant Occupational Safety and Health Appeals Board of the State of California, its officers, employees and agents, from continuing any proceedings related to the enforcement of citations issued by the Division of Industrial Safety for safety violations at United's San Francisco operations and maintenance facilities; and

(c) such other and further relief as the court shall deem appropriate.

This Motion is based on the Notice of Motion, the attached affidavits and all the pleadings and papers on file in this action.

This Motion is made on the grounds that the relief sought is proper and plaintiff has no other speedy or effective remedy.

Paul M. Tschirhart
Paul M. Tschirhart
Robert H. Brown

Jean C. Gaskill
Kathleen Lucas-Wallace
Brobeck, Phleger & Harrison

Attorneys for Plaintiff,
United Air Lines, Inc.

Of Counsel:
Philip J. Hogan
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Attorneys for Plaintiff,
United Air Lines, Inc.

IN THE UNITED STATES DISTRICT COURT

For the Northern District of California

UNITED AIR LINES, INC.,
Plaintiff,

vs.

THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS, OF THE STATE OF CALIFORNIA,

and

THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA,
Defendants.

No. C 79-1107 (SW)

AFFIDAVIT OF WILLSON C. APPLEGATE

STATE OF CALIFORNIA
COUNTY OF SAN MATEO } ss:

Willson C. Applegate, being duly sworn, states as follows:

1. I have been employed by United Air Lines, Inc. (hereinafter "United"), as Director of Ground Safety since June, 1971. I am authorized to execute this affidavit on behalf of United.

2. The FAA regulations require United to prepare and keep current manuals for the use and guidance of flight and ground operations personnel in conducting its operations safely. These manuals have been developed and submitted to the FAA as required by FAA regulations found at 14 C.F.R. § 121.131 *et seq.* Such manuals must be acceptable to the Administrator and to the best of my knowledge and experience, United's current manuals have been fully accepted by the Administrator.

3. There are over 1,000 separate written specifications each on a different subject which cover the full gamut of safety practices and the use of safety gear for flight and ground personnel. These specifications contain detailed descriptions of ground and flight procedures involving the inspection and maintenance of aircraft and aircraft engines, parts and components, of fueling, overhauling, servicing, repairing and maintaining the aircraft at the O and M facilities as well as other related procedures necessary to provide for employee safety at United's San Francisco Maintenance Operations Center and United's facilities at San Francisco International Airport. The aforesaid specifications, safety rules procedures and warnings are enforced by United subject to inspection, review and further enforcement by the FAA. Because the manuals are too extensive to be attached, the Safety Index from United Regulation 5-12, "Ground Safety and Health" is attached as Exhibit A. This index indicates the broad scope of United's manuals with regard to safety at United's facilities.

4. On June 16 and 17, 1976, a representative of Cal/OSHA conducted an inspection at United's facility at San Francisco International Airport. As a result of this inspection, a citation was issued which alleged that United's employees were

performing maintenance on the tail engine of a DC-10 aircraft from a hi-lift platform not properly equipped with guardrails in violation of a standard issued under the Cal/OSHA statute. (A copy of the citation is attached as Exhibit B).

5. In United's FAA-accepted manual which is enforced at United's facility, different safety requirements are specifically imposed on United personnel who use the platforms referenced in paragraph 4 above. These practices are designed to protect employees from the potential hazard over which Cal/OSHA seeks to assert its jurisdiction [A copy of these regulations are attached as Exhibit C: "Maintenance Manual, Maintenance Specifications" (various pages relating to B-747 and DC-10 Safety and Harness Kit). The attached manual sections set forth in narrative and pictorial forms the safety practices which must be used in wearing the harnesses. The FAA has accepted our manuals and this practice. These safety practices are actively enforced at United's O and M facilities.

6. On June 27, 1977, Cal/OSHA issued a citation at United's operations facility at San Francisco International Airport for alleged violation of a standard issued under the Act in that a number of Phillippine Airlines LD-3 cargo containers being serviced by United pursuant to contract were damaged and posed a hazard to employees. (A copy of the citation is attached as Exhibit D).

7. On July 15, 1977, FAA personnel inspected the same cargo operation referenced in paragraph 6 above, and found United to be in violation of FAA safety rules [A copy of these regulations are attached as Exhibit E: "Overhaul Manual, Equipment/Furnishings" (pp. 1, 2, October 7, 1974) and "Maintenance Manual, Maintenance Specifications" (p. 1, January 21, 1976) (paragraph 13 of the Complaint)] and ordered United to correct the hazard caused by the damaged containers. [FAA letter is attached as Exhibit F].

8. As a result of inspections conducted by the Division on July 14, 21, 24-28, 31, 1978 and August 1-4, 1978, a citation was issued against United by Cal/OSHA for alleged violations of foot protection standards at United's Maintenance Operations Center at the San Francisco International Airport. (A copy of the citation is attached as Exhibit G).

9. The FAA, however, in accepting United's required manuals, also regulates the type of footwear to be worn by United's personnel. [A copy of the regulations are attached as Exhibit H: "Administrative and Operating Procedures Manual-Operations" (p. 1, February, 1977) and "Airframe Maintenance Operating Procedures-Safety and Housekeeping" (p. 3, December 1, 1977)].

10. On January 10, 1979, an accident occurred at United's Operations Maintenance Center. Although we knew that the FAA had jurisdiction we were confused and uncertain about Cal/OSHA's jurisdiction. Therefore, the accident was reported to both Cal/OSHA and the FAA for their respective and most likely duplicative investigations. The FAA has conducted its investigation but Cal/OSHA has not.

11. Because of the Division's attempts to regulate ground safety, United has incurred and will continue to incur, substantial costs it would not otherwise have suffered at its San Francisco facilities. These costs are in addition to United's substantial and necessary expenditures for employee ground safety provisions which are required by the FAA. The additional costs include: administrative and legal costs in relation to contested cases over the same question, namely the jurisdiction of Cal/OSHA; personnel costs relating to management and union participation in the duplicative interviews, investigations and inspections; personnel costs relating to safety staff involvement with the inspections; costs related to duplicative reporting and recordkeeping requirements; and costs for lost

production and other disruptions of the business due to the Division's extensive interviewing of employees during inspections and investigations.

12. I have personal knowledge of the foregoing matters and if called upon to testify, would testify accordingly.

Willson C. Applegate
Willson C. Applegate

SUBSCRIBED AND SWORN to before me on this 7th day of May, 1979.

Rodger E. Simonian
Notary Public

INTRODUCTION

1. REGULATIONS 5-12

A. *Purpose and Scope* Chapter 5-12 provides policies and procedures that apply to all UA organizations on the subject of safety and health in UA's ground operations. The chapter does not include procedures for doing a specific task safely; such procedures are included in the functional regulations or instructions for the job.

B. *Index* The chapter also provides an index to safety and health references that appear in other company regulations, manuals, and informational bulletins.

2. SUPPLEMENT TO REGULATIONS 5-12

A. *Ground Safety and Health Bulletins* SFOSY distributes supplemental information about safety, health, and fire protection in the form of Ground Safety and Health Bulletins. Employees concerned with the subject matter in these bulletins must be made aware of this information. See the index of this chapter for a list of Bulletins in the supplement. Direct spare page requests to SFOSY.

B. *Distribution and Location* The supplement is distributed to the Chapter 5-12 mail list and is to be inserted at the back of the chapter.

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Attorneys for Plaintiff,
United Air Lines, Inc.

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Plaintiff,

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and

THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA,
Defendants.

No. C 79-1107 (SW)

AFFIDAVIT OF CLIFFORD ASVITT

Clifford Asvitt, being duly sworn, states as follows:

1. I am employed by United Air Lines, Inc. (hereinafter "United") as the Director of United's Quality Assurance. I am preparing this on behalf of United.

2. I am the primary contact for quality and maintenance between the inspectors from the Federal Aviation Administration ("FAA") and United's facilities at the San Francisco International Airport.

3. The FAA has two Principal Maintenance Operations Inspectors assigned to United's O and M facilities at San Francisco. Their staff of eight inspectors audits the facilities and operations on a regular basis. On a daily basis, approximately three or four inspectors are on the site. They inspect for violations of the FAA's and United's manual requirements. United's manuals contain separate written specifications and requirements which are enforced by the FAA inspectors. These manuals which contain in excess of 1,000 separate written specifications also contain detailed descriptions of safety gear and of the safety practices and procedures which must be followed by United's O and M facilities' personnel.

4. I have personal knowledge of the foregoing matters and if called upon to testify, would testify accordingly.

Clifford Asvitt
Clifford Asvitt

SUBSCRIBED AND SWORN to before me on this 7th day of May, 1979.

Rodger E. Simonian

Notary Public

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THE OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA,
Defendants.

No. C 79-1107 (SW)

ORDER, FINDINGS, AND PRELIMINARY INJUNCTION

The Motion of United Air Lines, Inc. for a Preliminary Injunction and the Motion of defendants to dismiss the cause

came on for hearing on July 20, 1979. Plaintiff appeared through Paul M. Tschirhart, Esq., admitted *pro hac vice,* Jean C. Gaskill, Esq., Kathleen Lucas-Wallace, Esq. and Brobeck, Phleger & Harrison, and defendants Division of Industrial Safety of the Department of Industrial Relations of the State of California and Occupational Safety and Health Appeals Board for the State of California having appeared through Matthew P. Boyle, Esq., Deputy Attorney General, State of California. The Court, having considered the evidence, both oral and documentary, and the arguments and memoranda of counsel, and being otherwise fully informed, makes the following:

FINDINGS

1. This court has jurisdiction under 28 U.S.C. §1331 and 1337.

2. Plaintiff United Air Lines, Inc. ("United") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Illinois. United is qualified to do business within the State of California and within the geographic boundaries of the Northern District of California. United is an air carrier within the meaning of the Federal Aviation Act, 49 U.S.C. §1301(3).

3. Defendant Division of Industrial Safety of the Department of Industrial Relations of the State of California (hereinafter "Cal/OSHA"), is now, and at all times relevant hereto has been, the California state agency responsible for enforcing compliance with the California Occupational Safety and Health Act of 1973, California Labor Code §§50.7, 114.5, 148-49, 6300 *et seq.* (hereinafter the "State Act").

4. Defendant Occupational Safety and Health Appeals Board for the State of California (hereinafter "Appeals Board"), is now, and at all times relevant has been, the agency charged with adjudicating and rendering final administrative decisions in disputes arising under the State Act.

5. The Federal Aviation Administration (hereinafter "FAA") has and exercises jurisdiction over plaintiff United's Operations and Maintenance facilities at the San Francisco International Airport (hereinafter "O and M facilities").

6. Cal/OSHA inspects, regulates and has consistently asserted jurisdiction over safety and health matters at the plaintiff's O and M facilities.

7. The Appeals Board continues to adjudicate matters relating to citations issued by Cal/OSHA at United's O and M facilities. United has exhausted all administrative remedies.

8. It appears at the present stage of these proceedings that the Federal Aviation Administration is vested by law with and exercises health and safety jurisdiction over plaintiff United's O and M facilities. 49 U.S.C. §§ 1341 *et seq.*, 1421 *et seq.*, 14 C.F.R. §§ 121.131 *et seq.* and 121.361 *et seq.*

9. Under the State Act, Cal/OSHA has safety and health jurisdiction over places of employment within the State of California except those places of employment where health and safety jurisdiction is vested by law in, and exercised by, a federal agency.

10. It appears at the present stage of these proceedings that the continued assertion of jurisdiction by Cal/OSHA and the Appeals Board is contrary to law and in violation of United's rights in that it subjects United to dual, conflicting and overlapping regulation.

11. It appears, and the Court concludes, that plaintiff United has suffered irreparable injury from said continued assertion of jurisdiction and unless enjoined, defendants will continue to cause United to suffer immediate and irreparable injury for which there is no adequate remedy at law.

12. Plaintiff United has demonstrated a likelihood of success on the merits of the case.

13. It appears that the granting of a preliminary injunction will not adversely affect any third party or the public interest in matters of health and safety since the FAA will continue to exercise jurisdiction over the health and safety of employees at the O and M facilities.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

Plaintiff's Motion for a Preliminary Injunction be, and the same hereby is, GRANTED;

IT IS FURTHER ORDERED that defendants' Motion to Dismiss be, and hereby is, DENIED;

IT IS FURTHER ORDERED that defendant Division of Industrial Safety of the Department of Industrial Relations of the State of California, its officers, employees and agents, and persons acting with said defendant, be, and hereby are, restrained and enjoined *pendente lite,* from making any inspection of, or in any manner attempting to regulate safety and health matters at United's O and M facilities; from enforcing or attempting to enforce any provision of the State Act at United's O and M facilities; and from asserting or in any manner attempting to assert jurisdiction over safety and health matters at United's O and M facilities;

IT IS FURTHER ORDERED that defendant Occupational Safety and Health Appeals Board of the State of California, its officers, employees and agents, and persons acting on behalf or in concert with said defendant, be, and hereby are, restrained and enjoined, *pendente lite,* from commencing or continuing any proceedings relating to the enforcement of citations issued by the Division of Industrial Safety for safety violations at United's San Francisco O and M facilities.

Nothing herein shall be construed to prevent either party from continuing to pursue the now pending proceeding in *United Air Lines, Inc.* v. *The Occupational Safety and Health*

Appeals Board, Civil No. 747-454, Superior Court of California in and for the City and County of San Francisco (pending). Pursuant to Federal Rules of Civil Procedure, Rule 65(c), plaintiff shall file and serve upon defendants an undertaking approved by the court in the sum of ____.

Spencer Williams
United States District Court Judge

UNITED AIR LINES, INC.,
Plaintiff-Appellee,

v.

The DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS of the State of California and the Occupational Safety & Health Appeals Board for the State of California, Defendants-Appellants.

No. 79-4489.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Aug. 12, 1980.

Decided Dec. 2, 1980.

The Division of Industrial Safety of the Department of Industrial Relations of the State of California and the Occupational Safety and Health Appeals Board for the State of California appealed from order of the United States District Court for the Northern District of California, Spencer Williams, J., granting airline's motion for preliminary injunction preventing the Division and the Board from enforcing, or attempting to enforce, California's health and safety laws at airline's operation and maintenance facilities. The Court of Appeals, Halbert, Senior District Judge, sitting by designation, held that district court had no federal question jurisdiction.

Reversed.

Federal jurisdiction must affirmatively appear in the complaint. 28 U.S. C.A. §§ 1331, 1337.

District court had no federal question jurisdiction over airline's action seeking to restrain Division of Industrial Safety of the Department of Industrial Relations of the State of

California from enforcing, or attempting to enforce, California's health and safety laws at airline's operation and maintenance facilities, since airline's allegation of federal preemption as a defense to Division's attempted enforcement of its citations was insufficient to support federal jurisdiction. 28 U.S.C.A. §§ 1331, 1337; West's Ann.Cal. Labor Code, §§ 6303(a), 6307; Federal Aviation Act of 1958, § 101 et seq., 49 U.S.C.A. § 1301 et seq.

Mere adoption by a state law of a United States law as criterion or test, when law of United States has no force proprio vigore, does not cause case under state law to be also a case under the law of the United States. 28 U.S.C.A. §§ 1331, 1337.

It is not enough that federal question appear in complaint as anticipation of or reply to probable defense, or that claim asserted is in nature of defense to threatened or pending action; rather right or immunity created by Constitution or laws of United States be essential element of plaintiff's claim. 28 U.S.C.A. § 1331.

On Appeal From the United States District Court For the Northern District of California.

Before ELY and FLETCHER, Circuit Judges, and HALBERT,* District Judge.

HALBERT, Senior District Judge:

The Division of Industrial Safety of the Department of Industrial Relations of the State of California ("Division") and the Occupational Safety and Health Appeals Board for the State of California ("Board") appeal from the district court's order granting United Air Lines' ("United") motion for a preliminary injunction preventing the Division and the Board

* Hon. Sherrill Halbert, Senior District Judge, United States District Court for the District of Eastern California, sitting by designation.

from enforcing, or attempting to enforce, California's health and safety laws at United's operation and maintenance facilities at the San Francisco International Airport.[1]

[1] It is Hornbook Law that federal jurisdiction must affirmatively appear in the complaint. *Phillips Petroleum Co. v. Texaco,* 415 U.S. 125, 127-28, 94 S.Ct. 1002, 1003-04, 39 L.Ed.2d 209, 212 (1974); *Pan American Petroleum Corp. v. Superior Court,* 366 U.S. 656, 662, 81 S.Ct. 1303, 1307, 6 L.Ed.2d 584, 589 (1961); *Home Federal Savings & Loan Ass'n v. Insurance Dep't of Iowa,* 571 F.2d 423, 425-26 (8th Cir. 1978). Jurisdiction does not appear in plaintiff's complaint in this case.[2] We reverse.

United asserts federal question jurisdiction founded on 28 U.S.C. §§ 1331, 1337. It argues that the provision in the California Labor Code setting the Division's jurisdiction to enforce California's occupational health and safety laws depends entirely on an interpretation of federal law. California Labor Code § 6307 provides that:

> The Division has the power, jurisdiction and supervision over every employment or place of employment in this state.

California Labor Code § 6303(a) defines "place of employment" as

> any place, and the premises appurtenant thereto, where employment is carried on, except a place the health and safety jurisdiction over *which is vested by law in, and actively exercised by, any state or federal agency other than the Division.*

(emphasis added).

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[1] The order granting the Preliminary injunction has heretofore been stayed by this court pending the disposition of this appeal.

[2] United has abandoned its earlier assertion of diversity jurisdiction; therefore, federal question jurisdiction is the sole basis upon which it relies in this appeal.

United contends that the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, provides that the Federal Aviation Agency (FAA) shall exercise health and safety jurisdiction over United's operation and maintenance facilities, and that the FAA "actively exercises" that jurisdiction. United argues that the federal question as to the scope of FAA authority is decisive, and therefore that the requirements of federal question jurisdiction are satisfied.

[2] This suit is plainly based on state law. The relief requested by United is that a federal court restrain the Division from enforcing state statutory law. Although it appears impossible to state with precision the test to be applied in determining whether an action arises under federal law, *see Town of Greenhorn v. Baker County, Oregon*, 596 F.2d 349, 351-53 (9th Cir. 1979); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1224-27 (9th Cir. 1979), *cert. denied*, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1980); *Smith v. Grimm*, 534 F.2d 1346, 1349-50 (9th Cir. 1976), *cert. denied*, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976) regardless of the formulation used, no federal question is present here. The controversy is based in state law, and United's argument primarily involves the interpretation of the state jurisdictional statute, California Labor Code § 6303(a). The federal issue of the scope of FAA authority is tangential to the task of construing the state statute and may not even be conclusive, since a state court could construe the "actively exercised by" language in section 6303(a) to mean something different from the limits of FAA jurisdiction.

[3] In defining the Division's jurisdiction in section 6303(a), California has incorporated a body of federal law. We agree with the sentiments expressed by Justice Holmes' dissent in *Smith v. Kansas City Title Co.*, 255 U.S. 180, 215, 41 S.Ct. 243, 250, 65 L.Ed. 577, 591 (1921):

> The mere adoption by a state law of a United States law as a criterion or test, when the law of the United States has no force *proprio vigore,* does not cause a case under the State law to be also a case under the law of the United States, and so it has been decided by this Court again and again.

See also Moore v. Chesapeake & Ohio Ry., 291 U.S. 205, 54 S.Ct. 402, 78 L.Ed. 755 (1934); *Morris v. Danna*, 411 F.Supp. 1300, 1305-07 (D.Minn.1976), *aff'd* 547 F.2d 436 (8th Cir. 1977); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3563 at 417-18 (1975).

[4] Federal question jurisdiction under 28 U.S.C. § 1331 requires that a right or immunity created by the Constitution or the laws of the United States be an essential element of the plaintiff's claim. *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70, 72 (1936). *See also Powell v. McCormack*, 395 U.S. 486, 516, 89 S.Ct. 1944, 1961, 23 L.Ed.2d 491, 513 (1969); *King County v. Seattle School Dist.*, 263 U.S. 361, 363, 44 S.Ct. 127, 68 L.Ed. 339, 341 (1923); *Starin v. Mayor of New York*, 115 U.S. 248, 257, 6 S.Ct. 28, 31, 29 L.Ed. 388, 390 (1885). It is not enough that a federal question appears in the complaint as an anticipation of or reply to a probable defense. *Phillips Petroleum Co. v. Texaco*, 415 U.S. 125, 128, 94 S.Ct. 1002, 1004, 39 L.Ed.2d 209, 212 (1974); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-74, 70 S.Ct. 876, 880, 94 L.Ed. 1194, 1200-01 (1950), or that the claim asserted is in the nature of a defense to a threatened or pending action. *Public Service Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237, 248, 73 S.Ct. 236, 242, 97 L.Ed. 291, 298 (1952); *Home Federal Savings and Loan Ass'n v. Insurance Dep't of Iowa*, 571 F.2d 423, 426 (8th Cir. 1978). In the instant case, United is a defendant in the state court action to enforce citations issued by the Division, and has stated that it has asserted and will continue to assert jurisdictional defenses in that action. Therefore, United's allegations of federal question jurisdiction in this appeal remain defensive in nature, and it cannot assert its jurisdictional objections to the state court action as a basis for jurisdiction in the federal courts.

Under facts similar to those present in this appeal, the Eighth Circuit found in *Home Federal Savings and Loan Association v. Insurance Department of Iowa,* 571 F.2d 423 (8th Cir. 1978) that an action for declaratory relief did not state a federal question when the allegations of federal jurisdiction merely reiterated defenses brought up at prior administrative proceedings. *Id.* at 426. United's jurisdictional allegation of federal preemption was first raised as a defense to the Division's attempted enforcement of its citations; therefore, under the rationale of *Home Federal,* these allegations are insufficient to support jurisdiction in this court. *Accord, State of Washington v. American League of Professional Baseball Clubs,* 460 F.2d 654, 660 (9th Cir. 1972).

United's secondary allegation that the relief it seeks is too comprehensive to be granted in state court is without merit. *Moore v. Sims,* 442 U.S. 415, 424-27, 99 S.Ct. 2371, 2378-79, 60 L.Ed.2d 994, 1004-05 (1979).

Since there is no federal jurisdiction upon which this case can be bottomed, there is no reason for us to consider, and we do not consider, the issue of abstention extensively discussed by both parties.

The order of the district court granting a preliminary injunction in this case is reversed.

[¶ 24,751] Northwest Airlines, Inc.

Text of Review Commission decision dated September 3, 1980. OSHRC Docket No. 13649. The Judge's decision appears at 1976-1977 OSHD ¶ 21,225.

OSHA Jurisdiction—Airplane Ground Maintenance Personnel—Federal Aviation Administration Rules—Employee Safety Manuals as "Regulations." A Judge correctly vacated for lack of jurisdiction a charge that an airline violated the general duty clause by not providing a means of protecting ground maintenance employees from the hazard of being crushed by the flaps of certain 747's while servicing their landing lights. Section 4(b)(1) of the Act precluded OSHA enforcement because the FAA possessed the statutory authority to regulate the health and safety of such employees, and the FAA validly exercised this authority through duly promulgated rules that require airlines to develop, subject to FAA disapproval, manuals that include provisions designed to further employee safety. The manual of the cited employer required compliance with a procedure to lock out the wing flaps while changing landing lights.

The Secretary argued unsuccessfully that the FAA's enabling legislation is not directed to occupational safety or health of ground maintenance personnel, but to the safety of aircraft in flight. However, the FAA's interpretation that it is not precluded from regulating ground personnel safety because the statute speaks of "safety of flight in air commerce" is to be given great weight; it was not unreasonable for the FAA to conclude that this phrase encompassed more than safety in flight. The provisions of the employer's maintenance manual fulfilled the preemption that another agency must issue standards or regulations, in that the FAA manual procedures permit each airline to benefit from its experience with a plane in actual service and to quickly implement the changes it thinks are

necessary. Thus the regulation was reasonable and practical in substituting a carrier's procedures for the minutiae of individual FAA approval.

Back reference: ¶ 516.

David M. Becker, Charles C. High, James A. Abbott, Janet R. Stenborg and E. Carl Uehlein for the employer. Baruch A. Fellner and Francis V. LaRuffa for the Secretary.

[Text of Review Commission Decision]

Before CLEARY, Chairman; BARNAKO and COTTINE, Commissioners.

BY THE COMMISSION:

This is a case under the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651-678 ("the Act"). A decision of Administrative Law Judge Jerome C. Ditore is before the Commission for review pursuant to section 12(j) of the Act, 29 U. S. C. § 661(i). The issue is whether Judge Ditore correctly vacated a citation issued by the Secretary of Labor ("Secretary") to Respondent, Northwest Airlines, Inc. ("Northwest"), on the basis that the working condition encompassed in the citation is exempt from the requirements of the Act pursuant to section 4(b)(1) of the Act, 29 U. S. C. § 653(b)(1).[1] We affirm the judge's decision.

I

Respondent employs ground mechanics at John F. Kennedy International Airport in Queens, New York, to service and maintain its Boeing 747 aircraft. When landing lights in the

[1] Section 4(b)(1) provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U. S. C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

wing of some Boeing 747's are to be serviced or changed, the leading edge or "Krueger" flaps are extended to give the mechanic access to the lights through the flap cavity. If the electro-pneumatically controlled flaps are activated, they quickly retract and, if the mechanic is in the cavity, the flaps may crush and kill or seriously injure him. A citation issued by the Secretary alleged that Northwest had violated section 5(a)(1) of the Act, 29 U. S. C. § 654(a)(1),[2] by not providing adequate means to protect its ground maintenance employees from this hazard. The Secretary alleged that the proper use of a lock-out/tag-out procedure and the installation of access panels in the wings of "old" 747 aircraft to give direct access to the landing lights[3] are feasible and useful steps that Northwest could but did not take to eliminate the hazard. Access panel kits, approved by the Federal Aviation Administration ("FAA"), are available from Boeing. The lock-out/tag-out procedure is prescribed by Northwest's maintenance manual, but the Secretary alleges that Northwest did not adequately implement the procedure.

Northwest denied that it had violated section 5(a)(1) and also claimed an exemption under section 4(b)(1).[4] Judge Ditore found that the cited working condition was exempt and vacated the citation. The Secretary's petition for review of this ruling was granted by Chairman Cleary and submissions were invited on the question of Judge Ditore had erred.[5] The

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[2] Section 5(a)(1) provides:

Sec. 5 (a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

[3] Boeing equips new 747 aircraft with such panels.

[4] See note 1 *supra*

[5] Former Commissioner Moran also directed review but did not state any issue. We reject Northwest's contention that the judge's decision was not timely directed for review by either Commissioner. Judge Ditore did not "make" his report under section 12(j) until it

Footnote continued on next page.

Department of Transportation ("DOT") has joined the parties in filing briefs and orally arguing the matter before the Commission.[6]

II

Section 4(b)(1) provides that working conditions for which federal agencies other than the Department of Labor "exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health" are

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Footnote continued from previous page.

was received by the Commission. *Gurney Indus.*, 74 OSAHRC 8/A2, 1BNA OSHC 1376, 1973-74 CCH OSHD ¶ 16,805 (No. 722, 1973). It is immaterial that he mailed it to the parties or anyone else at an earlier date. *Robert W. Setterlin & Sons Co.*, 76 OSAHRC 53/D8, 4 BNA OSHC 1214, 1975-76 CCH OSHD ¶ 20,682 (No. 7377, 1976); *Gulf & Western Food Prod. Co.*, 77 OSAHRC 72/A2, 4 BNA OSCH 1436, 1976-77 CCH OSHD ¶ 20,886 (Nos. 6804 & 6805, 1976).

[6] Oral argument was heard on February 16, 1978. This case was consolidated for his purpose with *Allegheny Airlines, Inc.*, OSHRC Docket Nos. 14291 & 14345. Commissioner Cottine became a Member of the Commission subsequent to that date. He has fully reviewed the record in this case, including the verbatim transcript of the oral argument. Accordingly, consistent with his statutory responsibilities, he is participating in this decision. *Perini Corp.*, 78 OSAHRC 43/C5, 6 BNA OSHC 1609, 1978 CCH OSHD ¶ 22,772 (No. 13029, 1978) (sep. opin.); see *Au Yi Lau v. U. S. Immigration and Naturalization Serv.*, 555 F. 2d 1036, 1042 (D. C. Cir. 1977); *Gearhart & Otis, Inc. v. SEC*, 348 F. 2d 798, 802 & nn. 12 & 13 (D. C. Cir. 1965).

exempt from the Act.[7] Accordingly, when a section 4(b)(1) exemption is claimed, our inquiry must begin with an examination of the relevant statutory and regulatory provisions of the other agency that allegedly support exemption under the Act.

Section 601(a) of the Federal Aviation Act of 1958,[8] 49 U. S. C. § 1421(a), requires the Administrator of the FAA to "promote safety of flight of civil aircraft in air commerce" by issuing:

> (1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;
>
> (2) Such minimum standards governing appliances as may be required in the interest of safety;
>
> (3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;
>
> (4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances and aircraft fuel and oil, required in the interest

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[7] It is well established that the burden of proving that a particular working condition is exempt from the Act pursuant to § 4(b)(1) rests with the employer claiming the exemption. *Idaho Travertine Corp.*, 77 OSAHRC 57/C9, 3 BNA OSHC 1535, 1975-76 CCH OSHD ¶ 20,013 (No. 1134, 1975), and cases cited therein.

[8] 49 U. S. C. §§ 1301-1542.

of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods or service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

Subsections (1) through (5) of section 601(a) enumerate specific subjects the Administrator may regulate. Subsection (6), which is the provision pertinent to this case, is a "catchall" provision that gives the Administrator general authority to issue rules and regulations promoting "national security and safety in air commerce."

The Administrator has promulgated a number of standards and regulations pursuant to section 601(a) and other statutes not relevant here. Among these is a requirement that "[e]ach domestic and flag air carrier shall prepare and keep current a manual for the use and guidance of flight and ground operations personnel in conducting its operations." 14 C. F. R. § 121.133(a). Such a manual must meet the following requirements that are pertinent to this case:

§ 121.135 *Contents.*

(a) Each manual required by § 121.133 must—

(1) Include instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety;

* * *

(b) The manual may be in two or more separate parts, containing together all of the following information, but each part must contain that part of the information that is appropriate for each group of personnel:

* * *

(16) Instructions and procedures for maintenance, preventive maintenance, and servicing.

The Administrator has also adopted rules that generally apply to maintenance work performed on aircraft. Insofar as relevant to this case, 14 C. F. R. § 43.13 provides:

§ 43.13 *Performance rules (general).*

(a) Each person maintaining or altering, or performing preventive maintenance, shall use methods, techniques, and practices acceptable to the Administrator. He shall use the tools, equipment, and test apparatus necessary to assure completion of the work in accordance with accepted industrial practices. If special equipment or test apparatus is recommended by the manufacturer involved, he must use that equipment or apparatus or its equivalent acceptable to the Administrator.

* * *

(c) *Special provision for air carriers and commercial operators.* Unless otherwise notified by the Administrator, the methods, techniques, and practices contained in the maintenance manual or the maintenance part of the air carrier manual of a certificated air carrier or commercial operator (that is required by its operating certificate or approved operating specifications to provide a continuous airworthiness maintenance and inspection program) constitute acceptable means of compliance with this section.

As part of the manual required by 14 C. F. R. § 121.133(a), Northwest prepares maintenance manuals for each type of aircraft that it operates. These individual manuals are largely derived from manuals prepared by the manufacturer of the aircraft. FAA employees present in a manufacturer's plant during the manufacture of a particular aircraft oversee the development of the maintenance manual for that type of plane.

When Northwest purchased its 747's, it received maintenance manuals from Boeing, which it reviewed prior to placing the planes in service. If it wanted to follow a procedure different from one specified in the manual, Northwest would notify the FAA of the proposed change and would, pursuant to 14 C. F. R. § 43.13, submit the entire manual with its proposed changes to the FAA. Unless notified by the FAA, Northwest could assume that its procedures were approved. Subsequently, Northwest could submit additional changes to the FAA, and these also would become effective unless specifically disapproved.[9]

The primary purpose of the manual is to assure that the aircraft is properly maintained so as to preserve its airworthiness. However, the manual also contains some provisions for the safety of maintenance employees. Among the provisions directed at the safety of maintenance workers is a lockout procedure dealing with the possibility that the leading edge flaps could retract and injure an employee who is changing the landing lights.

The FAA monitors air carrier operations and has employees assigned to Northwest on a permanent basis. Among other things, the FAA employees conduct inspections to determine if the airline is complying with the provisions of its maintenance manual. The FAA can and has issued disciplinary notices, some of which carry monetary fines, to both the airline itself and to individual mechanics. Although the FAA's inspections have encompassed procedures dealing with the safety of maintenance personnel, neither Northwest nor any of its mechanics have been cited by the FAA for violating any rules dealing solely with the safety of such personnel with respect to the airline's operations at John F. Kennedy Airport. Addition-

[9] The manufacturer might, from time to time, recommend changes in the procedures prescribed in a manual. It would notify all purchasers of the aircraft of such recommendations, and the individual purchasers would then decide whether to propose the change to the FAA.

ally, although Northwest's maintenance employees at JFK have suffered some injuries (of unspecified severity), the FAA has not investigated such incidents.

III

The Secretary argues, first, that the FAA's enabling legislation is not directed to the occupational safety or health of ground maintenance personnel, but to the safety of aircraft in flight. In his view, the test of *Fineberg Packing Co.*, 74 OSAHRC 14/E12, 1 BNA OSHC 1598, 1973-74 CCH OSHD ¶ 17,518 (No. 61, 1974) has not been met with respect to ground maintenance personnel.[10] Second, the Secretary argues that 14 C. F. R. § 43.13 is not directed to the occupational safety and health of ground maintenance personnel, but to the safety of aircraft in flight. Third, he submits that the noted regulations do not speak to the cited working condition, the servicing of the landing lights. Fourth, he maintains that the lock-out/tag-out instruction in Northwest's approved maintenance manual, which does speak to the cited working condition, is not a standard or regulation within the contemplation of section 4(b)(1). Finally, the Secretary argues that the manual's lock-out/tag-out instructions were neither "prescribed" nor "enforced" by FAA.

Northwest argues that the FAA has statutory authority to regulate the occupational safety and health of ground maintenance personnel, and that the FAA has exercised that authority in such a way as to create a section 4(b)(1) exemption in this case. It first maintains that the Secretary's reliance upon *Fineberg* is misplaced because the FAA's enabling legislation

[10] In *Fineberg* the Commission held that to be exemptive under § 4(b)(1), the statutory scheme of another federal agency, and standards or regulations prescribed or enforced under it, must have as a policy or purpose the inclusion of employees in the class of persons to be protected. It is not enough, the Commission added, that the statutory scheme have an incidental effect on employee safety or health.

does give the FAA authority to protect ground maintenance personnel, thus meeting the test of *Fineberg*. Northwest next argues that the FAA has sufficiently exercised its authority. It contends that Congress authorized the FAA to regulate all aspects of the airline industry and the FAA has exercised that authority through a comprehensive system of regulation, thereby leaving no room for the Secretary to enforce the Act's requirements in areas touched by the FAA's regulations. Moreover, according to Northwest, the FAA's comprehensive regulation of the industry demonstrates a decision by the FAA that conditions it has not regulated should remain unregulated. In support of its arguments, Northwest cites *Southern Railway Co. v. OSHRC*, 539 F. 2d 335, 339 (4th Cir.), cert. denied, 429 U. S. 999 (1976), in which the court interpreted the phrase "working conditions" in section 4(b)(1) to refer to the environmental area in which an employee works, and stated that once another agency exercises its authority to prescribe standards for such an area, the Act is preempted throughout that area. Northwest also cites *Southern Pacific Transportation Co. v. Usery*, 539 F. 2d 386, 391-92 (5th Cir. 1976), cert. denied, 434 U. S. 874 (1977), in which the court stated that another agency can preempt the Act by reaching and articulating a formal decision that a particular condition within its authority to regulate should be left unregulated.

Northwest also contends that the FAA's requirement that it develop and submit a maintenance manual for FAA approval is an exercise by the FAA of authority to prescribe or enforce the safety requirements contained in the manual. Because the manual contains provisions regulating the environmental area in which Northwest's maintenance employees work, then under its suggested interpretation of "working condition" discussed above, Northwest contends that the Secretary is preempted from citing for violations of the Act in such areas. Northwest further argues that, even under the narrowest approach to the term "working conditions," which it refers to as the "nook and

cranny" approach, an exemption exists in this case because its manual contains a provision directed at the very hazard cited by the Secretary: the possibility of inadvertent closure of the leading edge flaps during landing light maintenance.

The Department of Transportation argues that section 601(a) of the Federal Aviation Act, 49 U. S. C. § 1421(a), provides the FAA with the statutory basis for regulating all aspects of aviation safety, including the occupational safety and health of ground maintenance personnel, and therefore meets the test of *Fineberg*. DOT also maintains that 14 C. F. R. §§ 43.13 and 121.135 are valid regulations, and that the provisions of Northwest's maintenance manual are standards or regulations "prescribed pursuant to FAA regulatory requirements [14 C. F. R. §§ 43.13, 121.135 and 121.367] and enforced by FAA's statutory and regulatory authority over air carriers." Inasmuch as the cited working condition is dealt with in the manual, the FAA concludes that the cited working condition is exempt under section 4(b)(1).

Judge Ditore accepted Northwest's claim of an exemption but only with respect to the working condition cited here. He rejected what he viewed to be an attack by the Secretary upon the legal authority of the FAA to regulate as it has. He held that "[t]he authority conferred on the FAA in matters of safety encompasses ... not only the work of ground maintenance crews as it relates to airworthiness of aircraft, but includes the safe working conditions of the ground crews when performing aircraft maintenance work (49 U. S. C. § 1421)." The judge went on to hold that this authority had been lawfully exercised by the adoption of 14 C. F. R. §§ 43.13 and 121.135, among other regulations.

The fundamental dispute in this case is twofold. First, the parties disagree as to whether the FAA possesses "statutory authority" within the meaning of section 4(b)(1) to regulate the health and safety of airline ground maintenance workers.

Second is the question whether, if such authority exists, the FAA's rule requiring airlines to submit and comply with maintenance manuals is a sufficient exercise of that authority to give rise to a section 4(b)(1) exemption. For the reasons that follow, we agree with the judge's resolution of these issues.

IV

We consider first whether the FAA has the requisite statutory authority to regulate the working condition that is the subject of the citation at issue.

Section 4(b)(1) cases concerned with a sister agency's statutory purpose have fallen into four categories. First are those cases involving statutes that are concerned solely with the safety and health of particular employees. See *Idaho Travertine Corp.*, 77 OSAHRC 57/C9, 3 BNA OSHC 1535, 1975-76 CCH OSHD ¶ 20,013 (No. 1134, 1975) (Department of Interior—mine safety). The second category involves situations in which another agency acts to regulate employee safety and health, but the statutory authority serving as the basis of the agency's actions pertains to matters other than safety or health. See *Haas & Haynie Corp.*, 76 OSAHRC 144/E1, 4 BNA OSHC 1911, 1976-77 CCH OSHD ¶ 21,351 (No. 11127, 1976) (General Services Administration—procurement statute); *Gearhart-Owen Industries, Inc.*, 2 BNA OSHC 1568, 1974-75 CCH OSHD ¶ 19,329 (No. 4263, 1975) (Department of Defense —procurement statute). Third are situations in which an agency is empowered by statute to regulate an aspect of public safety and health, and its regulations directed toward that end incidentally affect the working conditions of employees in a manner unrelated to the statutory purpose. See *Fineberg Packing Co., supra,* (Department of Agriculture—Wholesome Meat Act). Fourth are cases in which a statute authorizes an agency to regulate an aspect of public safety or health, and certain employees directly receive the protection the statute is

intended to provide. See *Organized Migrants in Community Action, Inc. v. Brennan,* 520 F. 2d 1161 (D. C. Cir. 1975) (Environmental Protection Agency—Federal Environmental Pesticide Control Act of 1972); *Texas Eastern Transmission Corp.,* 75 OSAHRC 88/D9, 3 BNA OSHC 1601, 1975-76 CCH OSHD ¶ 20,092 (No. 4091, 1975) (Department of Transportation Office of Pipeline Safety—Pipeline Safety Act); *Mushroom Transportation Co.,* 73 OSAHRC 51/E10, 1 BNA OSHC 1390, 1973-74 CCH OSHD ¶ 16,881 (No. 1588, 1973) (Department of Transportation—Motor Carrier Safety Regulations); *Southern Pacific Transportation Co.,* 74 OSAHRC 83/A2, 2 BNA OSHC 1313, 1974-75 CCH OSHD ¶ 19,054 (No. 1348, 1974), *aff'd,* 539 F. 2d 386 (5th Cir. 1975), cert. denied, 434 U. S. 874 (1977) (Department of Transportation—Federal Railway Safety Act); *American Airlines, Inc.,* 75 OSAHRC 2/C13, 3 BNA OSHC 1624, 1975-76 CCH OSHD ¶ 20,129 (No. 9392, 1975) (Federal Aviation Administration—packaging standards for radio-active material);[11] *Magnus Firearms,* 75 OSAHRC 44/B11, 3 BNA OSHC 1214, 1974-75 CCH OSHD ¶ 19,381 (No. 9342, 1975) (ALJ) (Bureau of Alcohol, Tobacco, and Firearms—regulation of sale and storage of explosives).

It is important to distinguish between the third and fourth categories. In *Fineberg Packing,* the Department of Agriculture exercised its authority to assure the purity of meat produced in a packing facility by regulating sanitary conditions in the plant.

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[11] The parties dispute whether *American Airlines* is precedent for concluding that the FAA has statutory authority to regulate the health and safety of airline ground personnel. There is no dispute, however, that the FAA has authority to preempt the Act by regulating conditions that affect the health and safety of airline flight crews during flight. Thus, at least to the extent that the FAA's standards for packaging of radioactive materials affect flight crew safety or health. *American Airlines* serves as an example of a situation in which FAA regulation would preempt the Occupational Safety and Health Act. We address the parties' contentions concerning the applicability of *American Airlines* to this case later in this opinion.

These regulations "affected" the conditions under which the packing plant employees worked, but whether or not the regulations added to their health and safety was purely fortuitous, for the Department of Agriculture regulations did not address that objective.

Texas Eastern Transmission is illustrative of the fourth category. There, Congress was concerned with accidents resulting from the transmission and storage of natural gas. Such accidents had affected both members of the public and employees working in the natural gas industry. Thus, in giving the DOT authority to regulate pipeline safety, Congress intended to protect both employees and the general public. Because employees were in the class the statute intended to benefit, the Commission concluded that DOT had the requisite authority to give rise to a section 4(b)(1) exemption.

The Secretary argues that this case falls within the third, or *Fineberg*, category. He contends that the FAA's enabling legislation is solely concerned with safety of aircraft in flight. The Secretary does not dispute that the FAA can regulate the maintenance procedures used on a plane to achieve this end and that the FAA can therefore "affect" the working conditions of maintenance employees. However, the Secretary argues that the FAA's statutory authority to regulate maintenance procedures is limited to assuring the safety of the aircraft in flight and does not extend to the protection of maintenance workers while performing maintenance activities.

Northwest, on the other hand, argues that the FAA's statutory authority does encompass the authority to regulate the safety and health of maintenance personnel, and the FAA also takes this position. Northwest and the FAA contend that *American Airlines, supra*, is dispositive of this issue. In that case, an airline was cited for allegedly violating certain of the Secretary's standards governing exposure of employees in its cargo terminal to radiation. The FAA had promulgated

standards governing the packaging of radioactive material to be transported in air commerce. The Commission held that, as a result of these FAA standards, the working conditions at issue were exempt from the Act pursuant to section 4(b)(1). The Commission reasoned that the FAA's packaging standards were intended to protect all persons who might come near packaged radioactive material and thus directly affected the safety and health of the employees in the airline's cargo facility. The Commission did not, however, address the particular issue involved here of whether ground employees were within the class of persons the FAA's enabling legislation intended to protect. The Secretary had not raised or argued that issue, essentially conceding it for purposes of that case.

Inasmuch as the FAA's statutory authority was not disputed in *American Airlines*, the Commission decision cannot be considered binding precedent on that point. In general, the Commission relies on a party that has been aggrieved by an administrative law judge's decision to present its exceptions to the Commission and, with rare exceptions, the Commission addresses only those issues raised by a party. This policy is now codified in Rule 92 of our Rules of Procedure.[12] But even before that rule became effective, the Commission had announced that issues decided by an administrative law judge but not explicitly addressed by the Commission could not be considered binding precedent. *Leone Construction Co.*, 76 OSAHRC 12/E6, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976).[13]

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[12] Rule 92 was originally designated Rule 91a and codified in 29 C. F. R. § 2200.91(a). It was redesignated Rule 92 at 44 Fed. Reg. 70,106, 70,111 (1979), and will be codified in 29 C. F. R. § 2200.92.

[13] We also note that the facts of *American Airlines* did not present the issue of the FAA's statutory authority as sharply as does the present case. In *American Airlines*, the FAA regulations, if complied with, would protect any persons who came into proximity with packaged radioactive material. Thus, passengers, flight crews, and ground employees would receive similar protection. Here,

Footnote continued on next page.

In determining whether the FAA has the statutory authority to regulate the health and safety of airline maintenance personnel, we must give considerable weight to the fact that the FAA interprets its enabling legislation to give it such authority. See *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944). Even if another agency claims authority not explicitly granted by statute, the agency's interpretation is nonetheless controlling if the authority can be reasonably implied from the statute. See *Chrysler Corp. v. Brown*, 441 U. S. 281, 99 S. Ct. 1705, 1721 (1979), citing *National Broadcasting Co. v. U. S.*, 319 U. S. 190 (1954). See *Batterton* v. *Francis*, 432 U. S. 416 (1977). Thus, our task is not to determine de novo the proper scope of the FAA's enabling legislation, but to determine whether the FAA's conclusion that it has authority to regulate the health and safety of airline maintenance personnel is reasonably supported by its enabling legislation.[14]

The Secretary argues, in effect, that the FAA's interpretation is not reasonable because its enabling legislation clearly limits the FAA to regulating "safety of flight."[15] We do not agree that the Federal Aviation Act precludes the FAA from regulating the safety of ground personnel. Undoubtedly, prevention of airplane crashes was Congress' primary consid-

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however, the provisions in the Northwest maintenance manual governing the working condition cited by the Secretary are expressly designed to protect maintenance employees; passengers and flight crew members will not be endangered by premature retraction of the leading edge flaps during maintenance. Since the FAA's regulations in American Airlines were not directed explicitly at maintenance workers, the parties may well have overlooked the issue of whether the FAA's statutory authority encompasses the safety and health of maintenance workers.

[14] The deference shown by the Supreme Court to an agency's interpretation of its enabling legislation, see *Udall v. Tallman*, 380 U. S. 1 (1965), is rightfully extended by another administrative agency as well.

[15] The relevant parts of 49 U. S. C. § 1421(a) are quoted *supra*.

eration in enacting the legislation in question. But to recognize that prevention of crashes was Congress' primary concern does not mean that it was Congress' sole concern. The statute reflects the other concerns of Congress. While section 1421(a) speaks of "safety of flight in air commerce," subsection 6 of section 1421(a) authorizes the FAA to establish standards and regulations "as the Administrator may find necessary to provide adequately for national security and safety in air commerce." If, as the Secretary argues, the scope of section 1421(a)(6) is limited to "safety of flight in air commerce," this reads out of the statute entirely the reference to national security. Rather than adopt such an interpretation, the FAA concluded that Congress did not intend section 1421(a)(6) to be limited to safety of flight. This interpretation is consistent with "the well-settled rule of statutory construction that all parts of a statute if at all possible, are to be given effect."[16] Moreover, it was not unreasonable for the FAA to conclude that the phrase "safety in air commerce" in section 1421(a)(6) encompasses more than safety of flight and includes the ground safety of airline personnel who are an integral part of air commerce. We therefore accept the FAA's interpretation that section 1421(a)(6) authorizes it to regulate the working conditions of an airline's maintenance personnel to assure their safety.

V.

The next question is whether the FAA has exercised its statutory authority in such a manner as to exempt the cited working condition from the Act. For the reasons stated below, we conclude that another agency preempts the Act only by issuing standards or regulations having the force and effect of

[16] *Weinberger v. Hynson, Westcott, and Dunning, Inc.*, 412 U. S. 609, 633 (1973).

law.[17] We further conclude that the provisions of Northwest's maintenance manual fulfill this criterion. Because the manual addresses the specific hazard for which Northwest was cited, we conclude that the Act does not apply to that working condition.[18]

Not all requirements that administrative agencies impose under the guise of standards or regulations have the force and effect of law. To have the force and effect of law, a rule[19] must have two characteristics: there must be statutory authority for the agency to regulate the subject and, in adopting the rule, the agency must follow whatever procedural requirements Congress has imposed by statute. *Chrysler Corp. v. Brown, supra,* 99 S. Ct. at 1718.

The Occupational Safety and Health Act authorizes the Secretary to promulgate rules affecting occupational safety and health, specifies procedures for the promulgation of such rules,

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[17] The standards or regulations must also meet the *Fineberg* criterion of having the protection of occupational safety and health as a policy or purpose. We reject the Secretary's argument that 14 C. F. R. § 43.13 does not evidence such a policy or purpose. Section 43.13, which requires an airline to comply with the manual it has developed, must be read in conjunction with 14 C. F. R. § 121.135, which provides that a manual must contain provisions to enable personnel to perform their work with a high degree of safety. This clearly reflects an intent to protect workers while they are performing maintenance work, and this intent is further demonstrated by the inclusion in Northwest's manual of a number of provisions directed exclusively at the safety of maintenance workers.

[18] Because of this conclusion, we do not address Northwest's broader arguments to the effect that the cited working condition would be preempted even in the absence of a provision in its manual directed at the cited hazard.

[19] As used in the Act, a "standard" is a substantive rule containing a requirement "reasonably necessary or appropriate to provide safe or healthful employment." 29 U. S. C. § 652(8). A "regulation" is a rule governing matters such as posting of notices, recordkeeping, and conduct of inspections. *E. g.,* 29 U. S. C. §§ 657(c)(1)-(3), 657(e), and 657(g)(2). We shall use the word "rule" to refer to both "standards" and "regulations."

and provides for penalties for employers who violate the rules. 29 U. S. C. §§ 654(a)(2), 655(a) and (b), and 666(a)-(d). Standards that are properly promulgated under the Act therefore have the force and effect of law. Thus, when Congress used the words "standards" and "regulations" in the Act, it meant rules having the force and effect of law. As words used in a statute normally should be read to have the same meaning throughout,[20] this strongly suggests that, in using "standards or regulations" in seciton 4(b)(1), Congress contemplated only rules having the force and effect of law. Indeed, since only rules issued pursuant to appropriate statutory authority have the force and effect of law, Congress' very use of the phrase "statutory authority" in section 4(b)(1) suggests it intended that only rules having the force and effect of law could preempt the Act under section 4(b)(1).

The same conclusion follows from an examination of the purposes of the Act. The Act represents Congress' first attempt to comprehensively regulate the entire field of occupational safety and health.[21] Congress provided that employers generally would have to comply with mandatory rules issued by the Secretary of Labor. Congress was also aware that other agencies had already issued, or had authority to issue, rules governing limited areas of occupational safety and health and, in enacting section 4(b)(1), Congress obviously intended to leave such rules in place and to give them priority over OSHA regulation. It would be inconsistent with this carefully wrought system to conclude that binding rules issued under the Act

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[20] *United States v. Cooper Corp.*, 312 U. S. 600, 606-7, (1941).

[21] 116 Cong. Rec. 37325 (1970) (remarks of Sen. Williams), reprinted in Legislative History of the Occupational Safety and Health Act of 1970 at 414 (1971) [hereinafter cited as Legislative History]; see also 116 Cong. Rec. 41762 (1970) (remarks of Sen. Williams), reprinted in Legislative History at 1146 (Act provides first comprehensive program); S. Rep. No. 91-1282, 91st Cong., 2d Sess. 4 (1970), reprinted in [1970] U. S. Code Cong. & Ad. News 5177, 5180; H. R. Rep. No. 91-1291, 91st Cong., 2d Sess. 15-16, reprinted in Legislative History at 831, 845-846.

could be preempted by provisions of other agencies lacking the force and effect of law. It is more reasonable to assume that Congress intended that provisions having no leagl effect would not operate to preempt mandatory rules pursuant to section 4(b)(1).

By the same token, however, if another agency's rule having the force and effect of law does regulate a particular working condition, then it preempts regulation of that condition under the Act. Although Congress intended to comprehensively regulate occupational safety and health, Congress enacted section 4(b)(1) to avoid having the Secretary duplicate work that was being done by other agencies. *Taylor v. Moore-McCormack Lines, Inc.*, 8 BNA OSHC 1277, 1279 (4th Cir. May 1, 1980); *American Petroleum Institute v. OSHA*, 581 F. 2d 493, 510 (5th Cir. 1978), *aff'd sub nom. Industrial Union Department v. American Petroleum Institute*, 48 U. S. L. W. 5022 (U. S. July 2, 1980); *Marshall v. Northwest Orient Airlines, Inc.*, 574 F. 2d 119, 122 (2d Cir. 1978); *Organized Migrants in Community Action, supra*, 520 F. 2d at 1167; see also 29 U. S. C. § 653(b)(3). Just as it would be unreasonable to conclude that Congress intended to leave gaps in coverage, it would be similarly unreasonable to conclude that section 4(b)(1) permits the Act to apply to a working condition which is governed by the rules of another agency issued pursuant to statutory authority having the purpose of protecting employees. That is the exact situation that section 4(b)(1) seeks to avoid.

The Secretary argues, however that despite the language of section 4(b)(1), which says that the Act is preempted if another agency "prescribes *or* enforces" rules affecting occupational safety and health, and exemption only arises if the other agency both prescribes *and* enforces such rules. Thus, in the Secretary's view, regardless of the legal effect of the other agency's regulations, the Commission must determine that the other agency is actively enforcing its rules before it can find a section 4(b)(1) exemption.

This Argument must be addressed in the context of our conclusion that the Act is only preempted by rules of another agency that have the force and effect of law. Such rules must necessarily be associated with some mechanism for enforcement, whether by the promulgating agency or by other means.[22] Thus, once such rules have been issued, for the Commission to base a section 4(b)(1) exemption on the manner in which the rules are enforced would necessarily involve the Commission's passing judgment either on the efficacy of the enforcement mechanism Congress has provided or on the adequacy with which another agency is using the enforcement powers at its disposal. As to the former, section 4(b)(1) does not permit an inquiry into the stringency of the enforcement powers that Congress has established for enforcing the rules of another agency. *Organized Migrants in Community Action, supra,* 520 F. 2d at 1169-70. Concerning the latter, section 4(b)(1) does not permit the Commission to oversee the adequacy of another agency's enforcement efforts. *Pennsuco Cement and Aggregates, Inc.,* 80 OSAHRC, 8 BNA OSHC

[22] The Federal Aviation Act provides several mechanisms by which rules issued by the Administrator pursuant to 49 U. S. C. § 1421(a) may be either directly or indirectly enforced. The Secretary of Transportation is given the authority to assess civil penalties for violation of the rules. 49 U. S. C. § 1471. See *U. S. v. Garrett,* 296 F. Supp. 1302 (N. D. Ga. 1969), aff'd. 418 F. 2d 1250 (5th Cir. 1969), cert. denied, 300 U. S. 927 (1970). The Administrator of the FAA is authorized to modify, suspend, or revoke an air carrier's operating certificate if he determines that such action is required by "safety in air commerce or air transportation and the public interest." 49 U. S. C. § 1429. Furthermore, whenever "an emergency requiring immediate action exists in respect of safety in air commerce," the Administrator may, without notice or hearing, issue such orders, rules, or regulations, "as may be essential in the interest of safety in air commerce to meet such emergency." 49 U. S. C. § 1485(a).

The Federal Aviation Act also provides for criminal penalties for violations of the Administrator's rules, 49 U. S. C. § 1472, an enforcement mechanism that is outside the control of the DOT or FAA.

1378, 1381, 1980 CCH OSHD § 24,478 at 29,890 (No. 15642, May 8, 1980). Accordingly, once the Commission determines that a rule promulgated by another agency has the force and effect of law, we need not inquire further into the manner in which that rule is enforced.

Our inquiry thus reduces to whether the provisions in Northwest's maintenance manual have the force and effect of law. As discussed above, to have the force and effect of law, an agency rule must meet two requirements: the agency must have statutory authority to regulate the particular subject, and the rule must be issued in accordance with congressionally established procedures. As we have concluded that the FAA has statutory authority to regulate the safety of airline ground personnel, the remaining question is whether the FAA complied with proper procedures.

The FAA's enabling legislation involved in this case, 49 U. S. C. § 1421, does not specify procedures by which the regulations authorized in the statute must be promulgated. Therefore, the rulemaking provisions of the Administrative Procedure Act, 5 U. S. C. § 551-706 ("the APA"), apply. *Chrysler Corp. v. Brown, supra,* 99 S. Ct. at 1718. The APA generally requires that an agency give public notice of, and an opportunity for interested persons to comment on, a proposed rule before it is adopted. 5 U. S. C. §§ 553(b) and (c). Here, the FAA followed these procedures with respect to the rule, codified at 14 C. F. R. § 43.13,[23] that requires each airline to comply with its maintenance manual, but it did not follow these procedures with respect to the provisions contained in the manual. The question is whether the FAA can validly use such a procedure to make the manual itself legally binding on an airline.

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[23] 29 Fed. Reg. 5449, 5453 (April 23, 1964) (final rulemaking action); 28 Fed. Reg. 12096 (Nov. 13, 1963) (notice of proposed rulemaking).

The Secretary's principal argument against the validity of the FAA's manual procedure is that the requirements contained in a manual are not rules of general applicability, approved by the FAA after notice and an opportunity to comment, but are drafted by each individual airline and become effective without any prior FAA approval. According to the Secretary:

> where, as here, each airline controls its own safety matters, subject to disapproval by FAA, there is no guiding force to assure that safety, and not employer interests, are paramount in writing the manual .... Clearly a company acting on its own initiative and prerogative should not be able to decide when and to what extent OSHA is preempted.[24]

Under the Secretary's position, in order for a maintenance manual to legally bind airlines, the FAA would have to issue rules for each aircraft that apply uniformly throughout the airline industry. It would have to develop its own manual, presumably using the manufacturer's manual as a starting point, publish or incorporate this manual by reference in the Federal Register, seek comments from interested persons concerning the content of the manual, determine whether the proposed manual should be modified, and ultimately promulgate a final version of the manual before the airplane could be put into service.

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[24] The Secretary states that he does not contend the manual procedure is invalid vis-a-vis the FAA, but only that it is not a sufficient exercise of the FAA's authority to preempt the Act under § 4(b)(1). We have concluded, however, that the dispositive question is whether the manual has the force and effect of law, and this in turn depends on whether the FAA has satisfied APA procedures. Thus, if the procedures the FAA follows are inadequate to preempt the Act as to specific working conditions addressed by a manual, they are also inadequate to have any provisions of a manual bind an airline. In this respect, the Secretary's argument for finding the FAA's manual approval procedure inadequate to preempt the Act—that it allows each airline to control its own safety matters—applies with the same strength to matters of flight safety as it does to the safety of workers performing maintenance on an airplane.

There are obvious drawbacks to this approach. Perhaps the most serious is that it would inhibit the very objective the APA seeks to achieve through notice and comment rulemaking proceedings: an opportunity for affected persons to have a meaningful input into rules that affect them. If a manual was promulgated through APA rulemaking proceedings, it could be changed only by similar rulemaking proceedings.[25] Thus, after an aircraft is put into service and airlines and their employees become familiar with the aircraft and the manual on a day-to-day basis, they would be required to comply with procedures that were developed before they had gained any experience with the aircraft. It is likely that their experience would show that some of these procedures should be modified. If, however, a rulemaking proceeding is necessary before any such change could be instituted, it appears probable that few such changes would ever be implemented; at the very least, an airline would face a substantial delay in implementing a potentially superior procedure.[26] Thus, the industry would tend to be "locked-in" to procedures developed before the persons best able to judge whether better procedures exist have gained the experience necessary to form a judgment. On the other hand, the FAA's manual procedure permits each airline to benefit from its experience with a plane in actual service and to quickly implement the changes to the manufacturer's manual it thinks

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[25] Section 4 of the APA, 5 U. S. C. § 553, prescribes procedures that an agency must follow in rule making. The APA defines "rule making" as "agency process for formulating, *amending*, or repeating a rule." (Emphasis added). 5 U. S. C. § 551(5). Thus, the procedures set forth in 5 U. S. C. § 553 apply equally to amending a rule as to formulating one in the first instance. See *United States Steel Corp.*, 77 OSAHRC 12/D14, 2 BNA OSHC 1343, 1974-1975 CCH OSHD ¶ 19,047 (No. 2975, 1974).

[26] The record shows that Northwest submitted some 600 changes in its 747 manual to the FAA over a "representative," but unspecified, period of time. Even if all of these changes were ultimately implemented after FAA rulemaking proceedings, the necessity to conduct such a number of rulemaking proceedings would obviously place a considerable administrative burden on the FAA.

are necessary, subject only to FAA disapproval. This tends to promote input into an airline's maintenance procedures by those most knowledgeable with the problems and peculiarities of each type of aircraft: the airline's own employees. As one court has stated in rejecting the argument that an airline's manual was not legally binding: "Based on years of experience with the methods of certificated carriers, the regulation is reasonable and practical in substituting the carrier's procedures for the minutiae of individual FAA approval." *United States v. Garrett,* 296 F. Supp. 1302, 1304 (N. D. Ga. 1969), aff'd, 418 F. 2d 1250 (5th Cir. 1969), cert. denied, 300 U. S. 927 (1970).

The effectiveness of the FAA's manual system depends on the airlines acting in good faith and proposing only those changes to the manufacturer's manual that they think will achieve benefits in safety. The Secretary suggests that an airline could follow an entirely different path, scrapping the manufacturer's manual and writing its own so as to promote its own interests over those of its employees and the general public.

The Secretary's argument assumes that an airline would think it beneficial to follow a deliberate course of trying to deceive the government agency responsible for regulating virtually all aspects of the company's operations. It further assumes that the FAA would fail either to recognize if an airline was submitting changes to its manual that were detrimental to safety, or to take appropriate action if it discovered that an airline was doing this. Neither assumption is particularly compelling. But even if there is potential for abuse in the regulatory system that the FAA has chosen, the fact that a procedure may not be ideal is no reason to reject that procedure entirely. As discussed above, there would also be a serious drawback to the FAA's use of APA procedures to promulgate all of the detailed requirements appearing in airline manuals. Moreover, no system that the FAA might follow would guarantee that airlines would always follow safe procedures. Employers have been known to violate even OSHA standards.

It is also noteworthy that the Secretary himself has adopted certain rules that produce substantially the same effect as the FAA's manual approval procedure, that is, allow employers themselves to develop certain requirements with which they must comply.[27] The Secretary has promulgated other standards that do not impose rules that apply uniformly to all employers but require employers to comply with requirements developed or approved by third parties, requirements that did not exist when the Secretary promulgated his standards.[28] The existence

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[27] The following are examples of such standards:

29 C. F. R. 1926.24: The employer shall be responsible for the development and maintenance of an effective fire protection and prevention program at the job site throughout all phases of the construction, repair, alteration, or demolition work. . . .

29 C. F. R. § 1910.178(l): Only trained and authorized operators shall be permitted to operate a powered industrial truck. *Methods shall be devised to train operators in the safe operation of powered industrial trucks.* (Emphasis supplied.)

29 C. F. R. § 1910.178(n)(1): All traffic regulations shall be observed, *including authorized plant speed limits.* . . . (Emphasis supplied.)

[28] Significantly, this latter group generally involves, as does this case, specialized equipment for which modifications made after the equipment has been in use may make different safety requirements appropriate. Examples are:

29 C. F. R. § 1910.178(a)(4): Modifications and additions (to powered industrial trucks) which affect capacity and safe operation shall not be performed by the customer or user without manufacturer's prior written approval. . . .

29 C. F. R. § 1910.178(q)(6): . . . Additional counterweighing of fork trucks shall not be done unless approved by the truck manufacturer.

29 C. F. R. § 1910.179(b)(3): Cranes may be modified and rerated provided such modifications and the supporting structure are checked thoroughly for the new rated load by a qualified engineer of the equipment manufacturer. . . .

29 C. F. R. § 1926.550(a)(1): The employer shall comply with manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks. *Where manufacturer's*

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of such standards demonstrates the Secretary's recognition that an effective regulatory scheme need not contain only uniform requirements established by a government agency, but must allow room for modifications that experience may show are desirable.

In summary, we conclude that the FAA possesses the statutory authority to regulate the health and safety of airline maintenance personnel and that the FAA has validly exercised this authority through duly promulgated rules that require airlines to develop, subject to FAA disapproval, manuals that include provisions designed to further the safety of such personnel. Since Northwest's manual requires the airline to comply with a procedure to lock out the wing flaps while an employee is changing the landing lights on a Boeing 747, then section 4(b)(1) of the Act precludes the Secretary from citing Northwest with respect to any hazards allegedly arising out of such activities.

Accordingly, the judge's decision vacating the citation is affirmed. So Ordered.

COTTINE, Commissioner, concurring:

I join in the lead opinion's rejection of the Secretary's assertion that the FAA lacks the statutory authority to regulate the occupational safety and health of the affected employees in this case. The FAA's interpretation of its enabling legislation has a reasonable basis in law, see *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111 (1944), and it reasonably may be concluded that the FAA's statutory grant of authority contemplates the issuance of regulations affecting the safety and health of ground

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specifications are not available, the limitations assigned to the equipment shall be based on the determinations of a qualified engineer competent in this field and such determinations will be appropriately documented and recorded. Attachments used with cranes shall not exceed the capacity, rating, or scope recommended by the manufacturer. (Emphasis supplied.)

maintenance employees. In addition, I concur in holding that the FAA has exercised its authority in this case within the meaning of section 4(b)(1) of the Act, 29 U. S. C. § 635(b)(1).[1]

I

The FAA has not promulgated "standards or regulations" specifically related to the cited working condition. Only the provisions of Northwest's maintenance manual address the hazard to which maintenance employees are exposed when servicing or changing landing lights on Northwest's Boeing 747 aircraft. Thus, the issue in this case is whether these provisions are "standards or regulations" within the meaning of section 4(b)(1) of the Act. The maintenance manual is a document originally prepared by the aircraft manufacturer and submitted to the FAA for approval. The certificated carrier operating the aircraft may then modify the manufacturer's maintenance manual before the carrier submits its manual for FAA approval.[2] As a matter of law it is unclear whether the provisions of the manual are properly considered governmental regulations. Compare *Roberts v. Trans World Airlines,* 225 Cal. App. 344, 37 Cal. Rptr. 291, 299 (Dist. Ct. App. 1964) with *U. S. v. Garrett,* 296 F. Supp. 1302 (N. D. Ga. 1969), *aff'd,* 418 F. 2d 1250 (5th Cir. 1969), *cert. denied,* 399 U. S. 927 (1970).

Avoidance of duplicative governmental regulation is the intended purpose of section 4(b)(1).[3] In general, federal

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[1] Section 4(b)(1) states in pertinent part:

(b)(1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

[2] 14 C. F. R. §§ 43.13 and 121.133.

[3] *See Organized Migrants in Community Actions, Inc. v. Brennan,* 520 F. 2d 1161, 1167 (D. C. Cir. 1975); *Southern Pacific Transportation Co.,* 74 OSAHRC 83/A2, 2 BNA OSHC 1313, 1316, 1974-75 CCH OSHD ¶ 19,054 at p. 22,787 (No. 1348; 1974), *aff'd,* 539 F. 2d 386 (5th Cir. 1976), *cert. denied,* 434 U. S. 874 (1977); see also 29 U. S. C. § 653(b)(3).

standards and regulations that are recognized under section 4(b)(1) have attributes not shared by Northwest's manual. Substantively, they are officially promulgated or adopted by a federal agency in accordance with specific statutory criteria. In addition, the federal agency action follows a specific procedure that includes rulemaking with public notice,[4] published agency promulgation or adoption,[5] codification in the Code of Federal Regulations,[6] and an opportunity for judicial review.[7]

The rulemaking provisions of the Administrative Procedure Act, 5 U. S. C. § 553,[8] are designed "to guarantee to the public an opportunity to participate in the rule making process . . . and to grant interested persons an opportunity to present their views [on proposed substantive rules]." U. S. Department of Justice, Attorney General's Manual on The Administrative Procedure Act 26 (1947). The FAA's procedure for approving the manual apparently lacks public participation and an opportunity to be heard by interested parties, a factor relied on by the Secretary in asserting that the maintenance manual is neither a standard nor a regulation under section 4(b)(1). There is no indication in this record that those individuals most directly affected by the safety requirements contained in Northwest's manual—the employees—have the opportunity at any time to review and comment upon the proposed requirements. Nevertheless, the FAA has been granted the authority to regulate the safety and health of employees engaged in air commerce. Maintenance manuals of certificated carriers undergo a dual review process, and the FAA's manual approval procedure set forth in 14 C. F. R. § 43.13(c) has been upheld in the face of an assertion that it is an improper delegation of authority by the FAA to an individual carrier. *U. S. v. Garrett,*

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[4] 5 U. S. C. §§ 553(b) and (c).

[5] 5 U. S. C. § 552.

[6] 44 U. S. C. § 1505. This codification may take the form of an incorporation by reference. However, incorporations by reference are restricted as a matter of law. 1 C. F. R. Part 51.

[7] 5 U. S. C. §§ 701-706.

[8] See note 25 of lead opinion.

supra at 1304. If another agency's exercise is authorized by law, the Commission may not further inquire into the sufficiency of that exercise."[9] See *Mushroom Transportation Co., Inc.*, 73 OSAHRC 51/E10, 1 BNA OSHC 1390, 1973-74 CCH OSHD ¶ 16,881 (No. 1588, 1974), *appeal dismissed*, No. 74-1014 (3d Cir. April 17, 1974).

An approved maintenance manual was received by Northwest from the aircraft manufacturer. Northwest prepared its own manual and submitted it to the FAA for approval pursuant to the requirements set forth at 14 C. F. R. § 43.13 and § 121.133. Although the manual is unlike the standards and regulations prescribed or enforced under the several statutes to which Congress referred during its examination of the exemption question,[10] the manual has the force and effect of law and its provisions are enforced by the FAA. See, *e.g.*, *U. S. v. Garrett*, *supra*. Accordingly, in this case the FAA has exercised its authority to "prescribe . . . standards or regulations" within the meaning of section 4(b)(1).

II

The majority relies on *Pennsuco Cement and Aggregates, Inc.*, 80 OSAHRC, 8 BNA OSHC 1378, 1980 CCH OSHD ¶ 24,478 (No. 15642, 1980) for the proposition that section 4(b)(1) "does not permit the Commission to oversee the

[9] There is neither an assertion nor proof in this record that the FAA approval of the maintenance manual is merely a procedural formality without substantive review.

[10] For example, the legislative debates involve discussions of the Federal Metal and Non-Metallic Mine Safety Act of 1966, 30 U. S. C. §§ 721-740; the Federal Coal Mine Health and Safety Act of 1969, 30 U. S. C. §§ 801-960; and the Federal Railway Safety Act of 1970, 45 U. S. C. §§ 421-441. The first two of these statutes have recently been superseded by the Federal Mine Safety and Health Act of 1977, 30 U. S. C. §§ 801-962. Senate Committee on Labor & Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, 1018-1020, 1037 (Comm. Print 1971).

adequacy of another agency's enforcement efforts."[11] In determining whether another agency's regulatory activity with respect to a particular working condition results in a section 4(b)(1) exemption, the Commission will not inquire into whether the other agency exercises its authority "in the same manner or in an equally stringent manner" as OSHA. *Mushroom Transportation Co., supra,* 1 BNA OSHC at 1392, 1973-74 CCH OSHD ¶ 16,881 at p. 21,591. With respect to enforcement, an interpretation of section 4(b)(1) that "allows for the creation of a significant vacuum in the protection for American workers" is inconsistent with the preventive purposes of the Act. *Pennsuco Cement and Aggregates, Inc., supra,* 8 BNA OSHC at 1383, 1980 CCH OSHD ¶ 24,478 at p. 29,892 (concurring opinion). A section 4(b)(1) exemption is established only when at the time of the claimed exemption another agency is actually exercising its authority. *Indiana Harbor Belt Railroad Co.,* 77 OSAHRC 13/A2, 4 BNA OSHC 2006, 1976-77 CCH OSHD ¶ 21,473 (No. 12420, 1977); *Southern Pacific Transportation Co., supra; Texas Eastern Transmission Corp.,* 75 OSAHRC 88/D9, 3 BNA OSHC 1601, 1605 n. 9a, 1975-76 CCH OSHD ¶ 20,092 at p. 23,902 n. 9a (No. 4091, 1975). The record in this case satisfies that test and the citation must be vacated.

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[11] The relevant issue regarding agency authority in *Pennsuco* was not whether the Mine Enforcement Safety Administration (MESA) had exercised its authority in an adequate manner but whether MESA had exercised its authority at all. MESA had promulgated safety standards dealing with the cited conditions but had suspended all enforcement activities with respect to the standards. Accordingly, MESA was not exercising its authority over the cited working conditions at the time of the inspection in that case and Pennsuco was not entitled to an exemption under section 4(b)(1). I joined the majority in vacating the citation in *Pennsuco* because, under the unique facts presented, basic principles of due process dictated against penalizing Pennsuco for failing to comply with OSHA standards. Specifically, it was reasonable for Pennsuco to conclude, in the context of overlapping agency jurisdiction, that MESA had enforcement authority, in light of MESA's history of enforcement and its failure to publish or otherwise notify regulated employers of its suspension of enforcement activity.

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No. 80-1494

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

UNITED AIR LINES, INC.,
Petitioner,

vs.

THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA and THE OCCUPATIONAL SAFETY & HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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No. 80-1494

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UNITED AIR LINES, INC.,
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THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA and THE OCCUPATIONAL SAFETY & HEALTH APPEALS BOARD FOR THE STATE OF CALIFORNIA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Respondent Division of Industrial Safety (now entitled Division of Occupational Safety and Health and hereinafter referred to as Division or Cal/OSHA) respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner United Airlines, Inc. (hereinafter referred to as United) to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 2, 1980, in Case No. 79-4489, *United Airlines, Inc. v. the Division of Industrial Safety of the Department of Industrial Relations of the State of Cali-*

fornia and the Occupational Safety and Health Appeals Board for the State of California. The issue presented by United is whether the United States Court of Appeals properly determined that United's complaint failed to establish subject matter jurisdiction pursuant to 28 U.S.C. sections 1331 and 1337. The Division maintains that the Ninth Circuit's decision applied well established precedent which has concluded that federal question jurisdiction is not conferred when the federal question appears in the complaint as an anticipation of a probable defense to state action or there is a mere reference to federal law in a state statute. Given that the subject decision is consistent with prior articulation of federal question jurisdiction by this Court and other Courts of Appeals, the Division maintains that United has failed to fulfill the criteria expressed in Supreme Court Rule 19(1)(b) to justify review by way of certiorari.

STATEMENT OF THE CASE

On May 9, 1979, United filed in the United States District Court for the Northern District of California a complaint for declaratory and injunctive relief against the Division and the Occupation Safety and Health Appeals Board (hereinafter referred to as Appeals Board).[1]

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[1]United's allegation in its initial statement of the case that Cal/OSHA's enforcement of occupational safety and health law usurps the jurisdiction of the Federal Aviation Administration (hereinafter referred to as FAA) is not only argumentative but incorrect. All Division actions with reference to United have been limited solely to the safety and health of ground employees. The Division has never attempted to exercise any authority over flight personnel or the airplane itself. With reference to the airline's maintenance manuals which ostensibly in part cover safety matters,

The complaint requested the entry of a declaratory judgment holding that United's San Francisco Operations and Maintenance facility was not under the jurisdiction of the Division and the entry of a preliminary injunction restraining and enjoining (1) the Division from inspecting, regulating or enforcing its jurisdiction over United's San Francisco Operations and Maintenance facility, and (2) the Appeals Board from hearing and deciding any matters related to the enforcement of citations issued by the Division to United at this facility. (United's Petition, Appendix page 22A) The complaint filed by United stated that there was a State Court action, a Writ of Mandate,

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Langhorne Bond, Administrator of the FAA, stated in writing in response to questions presented by the Subcommittee on Government Activities and Transportation for the House Committee on Government Operations that:

> The operations manual, the areas which must be covered therein, and its distribution are all required by regulation. Also, the procedures contained in the manual may not be contrary to any FAA regulation. Apart from these requirements, the procedures set forth in the manual are not of a regulatory nature. Failure of an operator's employee to follow a procedure specified in the manual may result in company disciplinary action against the employee but cannot serve as the basis for FAA enforcement action unless failure to follow the procedure specified has also resulted in a violation of a Federal Aviation Regulation. (This material was submitted as an appendix to the Division's Motion for a Stay Pending Appeal to the Ninth Circuit and appears in the appendix at pages 1-3.)

United has not pointed once in the course of either the state or federal proceedings to one specific Federal Aviation Regulation (hereinafter referred to as FAR) pertaining to safety requirements for ground maintenance personnel. The reason is simple; with the exception of rules pertaining to transportation of hazardous substances, there are none. Given the Administrator's statement that the maintenance manuals are not considered to be of a

filed in the Superior Court in and for the City and County of San Francisco, which had been proceeding since December 26, 1978 (United's Petition, Appendix page 19A). It also stated that there were two administrative hearings concerning safety violations at United's Operations and Maintenance facility at the San Francisco Airport which were then pending before the Appeals Board. (United's Petition, Appendix pages 19A and 20A)[2]

On June 4, 1979, the Division and Appeals Board, filed a Motion to Dismiss. On July 26, 1979, the matter was heard by the United States District Court, which granted United's Motion and issued a preliminary injunction. (United's Petition, Appendix page 43A) On August 6, 1979, the Division and Appeals Board noticed an appeal and a motion for a stay of the preliminary injunction pending appeal. A minute order was entered on August 31, 1979 by the District Court denying the motion to stay the injunction pending appeal.

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regulatory nature, there can hardly be an usurpation by Cal/OSHA of FAA jurisdiction in the area of safety and health of ground maintenance employees.

[2]With reference to these actions, United's Petition for Writ of Mandate challenging the affirmance of a Division citation by the Appeals Board, which Petition was premised on jurisdictional grounds, was heard in San Francisco Superior Court on June 30, 1980; subsequently on September 11, 1980, Judge Ira A. Brown Jr. issued his decision which denied United's Writ in challenge to Cal/OSHA jurisdiction. (Appendix, page 4) United subsequently sought a Motion for Reconsideration from the Order denying its Writ of Mandate, which Motion was premised in its entirety on the decision by the Occupational Safety and Health Review Commission in *Northwest Airlines, Inc.*, Docket No. 13649, CCH OSHD ¶ 24,751 (1980). A hearing was held in reference to this matter

Subsequently, the Division and Appeals Board filed for a stay of the preliminary injunction with the Ninth Circuit Court of Appeals on October 29, 1979. On January 25, 1980, the Motion for a Stay Pending Appeal by the Division and Appeals Board was granted by the Ninth Circuit. Extensive briefs were filed by the parties with the Ninth Circuit and oral argument was heard on August 12, 1980; the Ninth Circuit on December 2, 1980, issued its decision which determined that the District Court Order granting a preliminary injunction must be reversed in that its suit was plainly based on state law and that federal question jurisdiction was not established.

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on October 9, 1980, and at the hearing Judge Brown from the bench denied United's Motion for Reconsideration of his decision. An Order denying reconsideration and a judgment denying the writ were entered on October 24, 1980. (Appendix, pages 5-8) United subsequently noticed its intent to appeal this decision to the First District Court of Appeal for the State of California. With reference to the administrative actions before the Appeals Board the first matter pertaining to a citation for failure to repair cargo equipment came to hearing on December 2, 1980; a decision by an administrative law judge for the Appeals Board was issued on February 4, 1981, which upheld the citation and concluded that there was a valid exercise of Division jurisdiction. *United Airlines*, Docket No. 77-R1D3-658 (February 4, 1981) (Appendix, pages 9-15) United subsequently filed a Petition for Reconsideration with the Appeals Board as a whole seeking a reversal of this decision. The second matter pertaining to a citation for failure to provide proper foot protection for employees came to hearing initially on February 17-20, 1981, and is scheduled to be completed in April or May of this year.

ARGUMENT

I

THE NINTH CIRCUIT COURT OF APPEALS ARTICULATED WELL ESTABLISHED PRINCIPLES OF LAW IN ITS DETERMINATION THAT UNITED'S COMPLAINT FAILED TO PRESENT A FEDERAL QUESTION

The decision by the Ninth Circuit that federal question jurisdiction was not established in United's complaint was premised upon two lines of decisions, which will be discussed after the theory of United's claim for injunctive relief is briefly reviewed. United's attempt to enjoin the enforcement of state occupational safety and health laws was based upon its argument that there was a *statutory* preemption pursuant to the terms of state law. California Labor Code 6307 sets forth the jurisdiction of the Division:

> The division has the power, jurisdiction and supervision over every employment or place of employment in this state.

The term "place of employment," which defines the areas over which the Division may assert jurisdiction and establishes certain exemptions from the exercise of jurisdiction, is found in California Labor Code 6303(a) which provides:

> "Place of employment" means any place and the premises appurtenant thereto, where employment is carried on except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division.[3]

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[3]The derivation of the definition of place of employment is found in an amendment to workers compensation and safety legislation in Stats. 1917, Ch. 586, page 861, section 33. The definition was

United argued that jurisdiction was properly before the Federal District Court because there was both a federal question and an action arising under an Act of Congress regulating commerce. United alleges that the federal statute under which the so-called action arises is the Federal Aviation Act of 1958, 49 U.S.C. section 1301 et seq. The Division has consistently maintained that this assertion is completely inaccurate. The California Occupational Safety and Health Act from which United seeks relief is a state law set forth in the California Labor Code. Labor Code section 6300 *et seq.*

In its Opposition to Motion for a Stay Pending Appeal with the Ninth Circuit, United stated:

> This action involves an analysis of the duties and responsibilities of the Federal Aviation Administration ("FAA") under the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301, *et seq.* ("Aviation Act"), and the effect which the carrying out of those duties and responsibilities has on the jurisdiction of Cal/OSHA, under its organic statute, the California Labor Code §§ 148-149, 6300 *et seq.* It is not a case of federal preemption; it is a case of statutory preemption since *the law* requires that the proper exercise of FAA

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codified as former Labor Code 6302 by Stats. 1937, Ch. 90, page 306, section 6302. Beyond the minor amendments to this section by Stats. 1945, Ch. 1431, page 2699, section 99, and the renumbering of the section to 6303(a) by Stats. 1973, Ch. 993, section 46, the section has remained in substantially similar form until the amendments in Stats. 1978, Ch. 1248, section 1, in which the words "health" and "and actively exercised" were added to the statutory definition. As can be seen, the definition of this term for purposes of California worker safety legislation long predated the enactment of the federal Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*

> jurisdiction precludes the continuing exercise of Cal/OSHA jurisdiction in the same "place of employment." (This statement appears on page 7 at lines 6-16 of United's Opposition to Motion for Stay Pending Appeal and at the Appendix at page 17.) (emphasis added)

The law to which United is referring is the exemption from Cal/OSHA jurisdiction set forth in California Labor Code section 6303(a). "Federal" is the only word in the state statute which is the lynchpin of United's argument that the case arises under federal law. Given this background, the Court of Appeals properly concluded that federal question jurisdiction was not created when federal law was relevant, at most, as an affirmative defense to state law. *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237, 248 (1952); *Home Federal Savings and Loan Association v. Insurance Department of Iowa*, 571 F.2d 423, 426 (8th Cir. 1978). As a corollary, subject matter jurisdiction is not conveyed when the federal question appears in a complaint in anticipation of probable defenses in an answer. *Phillips Petroleum Company v. Texaco*, 415 U.S. 125, 128 (1974); *Skelly Oil Company v. Phillips Petroleum Company*, 339 U.S. 667, 673-74 (1950).

The Division argued and the Court of Appeals concluded that the facts presented in the present case were extremely similar to the factual pattern in the Eighth Circuit decision in *Home Federal Savings and Loan Association v. Insurance Department of Iowa, supra. United Airlines, Inc. v. Division of Industrial Safety of the Department of Industrial Relations*, 633 F.2d 814, 817 (9th Cir. 1980). In that case the plaintiff alleged as a matter of federal preemption that the

State of Iowa could not exert jurisdiction over its operations; in this case United similarly argues that as a result of statutory preemption the state may not assert jurisdiction over its operations. In both cases the federal question was raised only in the context of a defense which could be brought up at enforcement proceedings. The determination by the Ninth Circuit in its *United* decision, *supra,* is consistent with prior precedents of this Court and the Eighth Circuit Court of Appeals that federal question jurisdiction cannot be established in the context of federal law appearing as a defense to the application of state law.

The second major premise relied upon by the Court of Appeals in deciding that federal question jurisdiction was not conferred was the conclusion that a state statute's reference to a federal statute as prescribing the rule and measure of the rights granted by the State does not make the determination of such rights a federal question. The definition of place of employment, which exempts from Cal/OSHA jurisdiction those places in which another federal agency is both vested by law with safety and health jurisdiction and actively exercises that jurisdiction, at most references federal law. However, the reference and possible incorporation of federal law would not springboard the California statutory provision to the status of a federal question sufficient to establish subject matter jurisdiction. *Moore v. Chesapeake and Ohio Railway,* 291 U.S. 205 (1934), *Louisville and Nashville Railway v. Western Union Telegraph Company,* 237 U.S. 300, 303 (1915), *Miller's Executor's v. Swann,* 150 U.S. 132, 136-137 (1893), *Morse v. Danna,* 411 F. Supp. 1300, 1305-1306 (D.Minn. 1976), affirmed 547 F.2d 436 (8th Cir. 1977).

The tests for determining jurisdiction pursuant to 28 U.S.C. section 1337, cases arising under any Act of Congress regulating commerce, are the same as those for determining jurisdiction under 28 U.S.C. section 1331. Thus, United's attempt to invoke federal question jurisdiction under section 1337 was also improper because the only legal construction which can either support or adversely impact United's claim is the construction of a *state law*, not the Federal Aviation Act. The fact that the Federal Aviation Act is indirectly involved is not sufficient to raise federal subject matter jurisdiction. *Molton, Allen and Williams, Inc. v. Harris*, 436 F. Supp. 853 (D.D.C. 1977); *Eickhof Construction Company v. Great Northern Railway Company*, 291 F. Supp. 44, 47 (D.Minn. 1968).

In conclusion, the decision by the Ninth Circuit in the *United* case, *supra*, articulates well established rationales for its determination that federal question jurisdiction was not established in the complaint and is consistent with relevant decisions of this Court and other Courts of Appeals.

II

UNITED'S COMPLAINT, AND THE ARTICULATION OF THAT COMPLAINT IN ITS BRIEFS, FAILED TO SET FORTH FEDERAL QUESTION JURISDICTION

Throughout its complaint, most notably in paragraphs 6, 11 and 15, and in paragraph A of its prayer for relief, (United's Writ, Appendix, pages 14A and following), United makes clear that its complaint for declaratory and injunctive relief is premised upon its belief that the Di-

vision is precluded from exercising jurisdiction over its facilities based upon the definition of place of employment in California Labor Code 6303(a) and United's corollary argument that the Federal Aviation Act of 1958, 49 U.S.C. section 1301 et seq., constitutes legal authority for an exemption from Cal/OSHA jurisdiction pursuant to the terms of the subject Labor Code section. The Ninth Circuit Court of Appeals concluded that "jurisdiction does not appear in plaintiff's complaint in this case." *United Airlines, supra,* 633 F.2d at 815. United in turn argues that "the Court of Appeals simply ignored United's complaint." (United's Writ, page 16) We would urge, however, that United itself ignored and subsequently limited its statement of jurisdictional grounds set forth in the complaint. In paragraph 2 of its complaint United claims that jurisdicion is based

> on the federal question raised by the matters alleged in this complaint, 28 U.S.C. section 1331; diversity of citizenship, 28 U.S.C. section 1332; and the federal preemption which arises by virtue of an Act of Congress regulating commerce, 28 U.S.C. section 1337. (United's Writ, Appendix, page 15A)

With reference to its alleged claim of diversity jurisdiction, after we pointed out in our opening brief that this proposition was untenable, citing *Moore v. County of Alameda,* 411 U.S. 693 (1973) and *Postal Telegraph Cable Company v. Alabama,* 155 U.S. 482, 487 *(1894)* (emphasis added), United admitted in its responsive brief before the Ninth Circuit that it "mistakenly asserted jurisdiction under 28 U.S.C. section 1332." (This statement appears in Footnote 5 on page 8 of United's brief and in Appen-

dix at page 19.) Similarly, with reference to United's claim that there was federal preemption which arose by virtue of an Act of Congress regulating commerce pursuant to 28 U.S.C. section 1337, United subsequently in its Opposition to Motion for a Stay Pending Appeal with the Ninth Circuit stated

> It is not a case of federal preemption; *it is a case of statutory preemption* since the law requires that the proper exercise of FAA jurisdiction precludes the continuing exercise of Cal/OSHA jurisdiction in the same "place of employment". (This statement, previously referred to, appears on page 7 at lines 12-16 of United's Opposition to Motion for Stay Pending Appeal and in Appendix at page 17.) (Emphasis added.)

Certainly at this juncture United cannot be heard to recant its own limitations on the jurisdictional theories initially enunciated in its complaint.

In any event, United articulates an argument that pursuant to the terms of the Federal Occupational Safety and Health Act, 29 U.S.C. 651 et seq., Cal/OSHA is federally preempted from exceeding the bounds of subject matter jurisdiction as articulated in section 4(b)(1) of the Act, 29 U.S.C. section 653(b)(1). United's apparent rationale is that since the California Occupational Safety and Health Act is authorized by the Federal Occupational Safety and Health Act and since there are some administrative decisions rendered by the Federal Occupational Safety and Health Review Commission which hold that section 4(b)(1) of the Federal Act requires Federal OSHA to defer health and safety jurisdiction to other federal

agencies under certain circumstances, that therefore, the Division must defer jurisdiction under the same circumstances. United asserts, without any authority being cited, that "the jurisdictional reach of the OSHA Act into the interstate commerce of United and other employers cannot be exceeded by the jurisdictional reach of an approved state plan." (United's Writ, page 7.) United's contention is completely unmeritorious for several reasons. To begin with, the theory of the provision in the Federal Occupational Safety and Health Act which permits state plans and the assumption of state jurisdiction is premised upon only minimum standards being fulfilled. The most significant part of Section 18, which authorizes state plans, with respect to this argument is the requirement that the state statutory scheme "for the development and *enforcement* of safety and health standards relating to one or more safety or health issues . . . will be at least as effective in providing safe and healthful employment and places of employment" as the federal program. 29 U.S.C. 667(c)(2). (Emphasis added.) The law does not say "the same say as" or "as restrictive as." The statute sets only a minimum standard; nothing in the federal law requires regulations and the enforcement of regulations in state plans to be uniform with one another or with federal law. As stated earlier, the derivation of the definition of place of employment in California Labor Code 6303(a), which establishes the confines of Cal/OSHA jurisdiction, extends back to the year 1917. When California submitted a state plan, which was approved in 1972, and adopted the California Occupational Safety and Health Act in 1973, the only requirement was that the coverage of the Cal/OSHA program would be at

least as effective in providing safety and health protection as would be accorded under the federal Act.

The Federal Occupational Safety and Health Administration (hereinafter referred to as Fed/OSHA), which is responsible for administering and enforcing State Plan requirements has interpreted the permissible jurisdictional scope of State Plans pursuant to Section 18, 29 U.S.C. 667, in accord with the Division. In Fed/OSHA Program Directive No. 77-5, dated October 30, 1978, pertaining to the Reference Book on Jurisdictional Issues, the following statement is made:

> However, Section 4(b)(1) limitations are strictly binding only on the Federal program. Therefore, a State may choose to exercise greater jurisdiction under its own law than is allowed to Federal OSHA. Any maximum limitation on State jurisdiction would be determined under the State law and other Federal law and applicable court decisions. (Appendix, page 21)

Moreover, the term "employer" in the federal Act is defined to exclude the United States or any state or political subdivision of the state, 29 U.S.C. 652 (5). Whereas the federal program is thus precluded from exercising subject matter jurisdiction over public employers, Section 18 of the federal Act requires that state plans to the extent permitted by state law provide effective and comprehensive coverage to all employees of public agencies. 29 U.S.C. 667(c)(6). To that end, the California program, with the exception of the assessment of civil penalties, California Labor Code 6434, applies equally to both public and private employers. California Labor Code 6304 (in which "employer" is defined to have the same meaning as California Labor Code 3300 which includes both public and private

employers.) In this manner, Cal/OSHA's jurisdiction extends to a subject matter not covered by the Federal Act.

Section 18(a) of the federal Act provides that a state may exercise jurisdiction *carte blanche* over any occupational safety or health issue with respect to which no standard is in effect under section 6. 29 U.S.C. 667(a). Thus, California has the prerogative of enforcing outside the confines of an approved state plan, if it so desired, regulations pertaining to safety and health issues which were not subject to coverage by a federal standard. Assuming arguendo that section 18(b) were not applicable and that Federal OSHA did not have jurisdiction over a particular place of employment, a state would not be precluded from exercising jurisdiction over such a place of employment to the extent that there was no federal standard in effect.

We find it curious that United cites as authority for resolution of the jurisdictional question the three leading Courts of Appeals decisions which analyzed OSHA jurisdiction over railroad operations. *Southern Railway Company v. Occupational Safety and Health Review Commission,* 539 F.2d 335 (5th Cir. 1976), *Southern Pacific Transportation Company v. Usery,* 539 F.2d 386 (5th Cir. 1976), *Baltimore and Ohio Railroad Company v. Occupational Safety and Health Review Commission,* 548 F.2d 1052 (DCCA 1976). In each of these decisions, in which challenges to OSHA jurisdiction over railroad operations pursuant to Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1), were rejected, the Courts of Appeals unanimously concluded that there was no industry-wide exemption from OSHA jurisdiction. (In each of these decisions, the Courts also rejected the railroad's argument that the Federal Rail-

road Administration's notice of intended rule making constituted an exercise of jurisdiction.) Of course, what United sought through its complaint for injunctive relief amounted to an industry-wide exemption over its entire operations and maintenance facilities at San Francisco International Airport. With reference to a similar attempt by another airline to obtain an industry-wide exemption, the Second Circuit Court of Appeals stated:

> The airline asks this Court to conclude that an entire hanger, and the multitude of possible hazards within it, are excluded from OSHA protection. Given the breath of the problem, our inquiry would of necessity be amorphous, unwieldy and lacking of expertise. In contrast, following an OSHA inspection and its administrative review, the issues will be greatly refined, and we will be made aware of the specific types of hazards that OSHA officials believe that are regulated by the FAA. *Marshall v. Northwest Orient Airlines, Inc.*, 574 F.2d 119, 122 (2nd Cir. 1979).

Thus in all relevant cases dealing with OSHA jurisdiction, no Court of Appeals has seen fit to grant an industry-wide exemption from OSHA jurisdiction.[4]

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[4]United's reliance upon *Weyerhaeuser v. Marshall*, 592 F.2d 373 (7th Cir. 1979) and *Continental Can Company v. Marshall*, 603 F.2d 590 (7th Cir. 1979) is misplaced. The former case dealt with a challenge to an inspection warrant which the court ultimately concluded did not set forth sufficient probable cause to permit an inspection; the second case dealt with OSHA's continuing efforts to enforce noise citations at Continental's facilities, which were similar with respect to noise problems, after OSHA had already lost before the Federal Occupational Safety and Health Review Commission a prior case concerning the same issue. Neither case cited by United dealt with the jurisdictional issue. However, both *Marshall v. Northwest Orient Airlines*, supra, and *Marshall v. Bur-*

Lastly, United argues that a recent decision by the Federal Occupational Safety and Health Review Commission, *Northwest Airlines, Inc., supra,* which vacated an OSHA citation requiring modification of the wing flaps of an airplane, on jurisdictional grounds pursuant to Section 4(b)(1), 29 U.S.C. 653(b)(1), constitutes a binding interpretation on Cal/OSHA jurisdiction pursuant to California Labor Code 6303(a). The Division maintains that this contention is incorrect for several reasons. The facts in the federal case differ substantially from those raised in the state proceedings. But most importantly, the statutory language creating exemptions from Cal/OSHA jurisdiction in California Labor Code 6303(a) differs from the terms of the comparable federal provision in Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1). The California statute requires that there not only be vesting of safety and health jurisdiction in another agency but there must also be an active exercise of that jurisdiction to preclude Cal/OSHA coverage.[5]

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lington Northern, Inc., 595 F.2d 511 (9th Cir. 1979) stand for the proposition that administrative remedies must be exhausted before the federal court considers the question of an agency's jurisdiction.

[5]United contended that pursuant to its affidavits the FAA could be said to have actively exercised jurisdiction at its facilities. United also claimed that the Division has never challenged this contention, nor could it. This allegation is incorrect. Because of what we perceived to be the glaring procedural infirmities of United's complaint for preliminary injunction and declaratory relief, the Division and Appeals Board did not respond to the complaint on the merits but instead filed a motion to dismiss, which argued among other things that there was no federal question jurisdiction, that there was a failure to exhaust administrative remedies, and that the court should abstain to permit California courts to first interpret a relevant state statute. These arguments were reiterated subsequently in the appeal to the Ninth Circuit. How-

In any event United will have the opportunity to raise its contention concerning the impact of this case in the forthcoming appeal before the California First District Court of Appeal, which will have the opportunity to construe the breadth and reach of this critical California Labor Code provision.

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ever, in reference to the issue of the exercise of FAA jurisdiction in the administrative proceedings which have heretofore been held before the Appeals Board, United has not once been able to point to an enforcement action undertaken by the FAA prior to an occupational safety and health issue being addressed by the Division. The absence of any past history of FAA involvement with safety and health issues was one of the primary reasons relied upon by the Appeals Board in its Decision after Reconsideration which upheld the citation issued to United Airlines. United Airlines—SFOCG, Docket No. 76-R1D3-878 (November 27, 1978) (This decision appears in the Appendix at pages 24-28.) [This decision was the subject of the petition for writ of mandate in San Francisco Superior Court, in which the Appeals Board's decision was upheld. The case has been noticed for appeal by United Airlines in the California First District Court of Appeal.] In the most recent decision involving United by an administrative law judge, which upheld the Division citation for failure to repair cargo equipment, the Division produced evidence that an employee had submitted a formal complaint concerning this condition in December 1975, that nothing was done to eliminate the hazard until after the Division's inspection in June 1977, and only after the Division citation did United Airlines itself request that the FAA conduct an inspection. *United Airlines*, Docket No. 77-R1D3-858 (February 4, 1981), appeal pending on reconsideration before the Appeals Board. (This decision appears in the Appendix at pages 9-15) The Division would suggest that there is a difference concerning the weight to be accorded affidavits not subject to cross-examination and testimony at an administrative proceeding subject to the rigors of the adversarial process.

CONCLUSION

For the reasons stated, Respondent Division of Occupational Safety and Health respectfully prays that the Petition for Writ of Certiorari to review the Ninth Circuit Court of Appeals' decision not be granted.

The Division's opposition to the Petition for Writ of Certiorari has been discussed with the Occupational Safety and Health Appeals Board and its attorney, Robert Heron, who has represented the Appeals Board in prior proceedings pertaining to this case. The positions and arguments herein set forth have been fully concurred in by authorization of the Appeals Board.

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(Appendix A follows)

APPENDIX A

Airline Deregulation and Aviation Safety

Hearings
Before a
Subcommittee of the
Committee on
Government Operations
House of Representatives
Ninety-Fifth Congress
First Session

September 8 and 9, 1977

Printed for the use of the Committee
on Government Operations

Operator's Manuals

Operator's manuals are required by section 121.133 of Part 121 of the FARs.

The required contents for these manuals are set forth in section 121.135, and the required distribution of these manuals is specified in section 121.137.

Generally it is a requirement that an operator must have a manual available for every person connected with the operation of aircraft. This includes crewmembers, appropriate ground operations and maintenance personnel and representatives of FAA assigned to the operator for certificate surveillance duties.

Mandatory topics for manual inclusion are outlined in the regulations. However, operators usually have added other items that their operating experience has shown to be useful for their specific operations.

The operations manual may be modified by the operator without prior FAA review and approval. However, a copy of the operations manual as well as any changes thereto must be furnished the FAA certificate holding office. If any phase of the manual does not meet regulatory standards, this is brought to the attention of the operator and a solution is worked out. If the FAA does not contact the operator relative to a change, this indicates tacit approval. It is important to note, however, that, in actual practice, for any substantive change in policy, an operator with a good working relationship with the FAA certificate holding office will obtain FAA suggestions about the change prior to publication.

The operations manual, the areas which must be covered therein, and its distribution are all required by regulation. Also, the procedures contained in the manual may not be contrary to any FAA regulation. Apart from these requirements, the procedures set forth in the manual are not of a regulatory nature. Failure of an operator's employee to follow a procedure specified in the manual may result in company disciplinary action against the employee but cannot serve as the basis for FAA enforcement action unless failure to follow the procedure specified has also resulted in a violation of a Federal Aviation Regulation.

There would be no basis to deny a modification to an operations manual if the proposed procedures were consistent with FAA regulations. If a proposed change were to make a procedure less stringent than required by regulations, however, the operator would be advised that operation under the provision would result in regulatory enforcement action.

Monitoring to ensure compliance with procedures outlined in an operator's operations manual is a part of an inspector's surveillance responsibility. Since any inspector assigned surveillance duty on a carrier must have access to that operator's manual, he is familiar with the company procedures outlined therein. Any person who operates in nonconformance with those procedures will be reported to POI and company management will be advised by the POI.

Superior Court of the State of California
for the City and County of San Francisco

Department 9

In Open Court

September 11, 1980

No. 747-454

United Air Lines, Inc.
Plaintiff.

vs.

The Occupational Safety Board and
Health Appeals Board,
Defendant.

Petitioner United Air Lines' petition for writ of mandate, heretofore submitted, is denied.

Costs to respondent.

/s/ IRA A. BROWN, JR.
Judge of the Superior Court

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Superior Court of California

City and County of San Francisco

No. 747-454

United Air Lines, Inc.
Petitioner,

vs.

The Occupational Safety and Health Appeals Board,
Respondent,

The Division of Occupational Safety and Health,
Real Party in Interest.

[Filed October 31, 1980]

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING WRIT OF MANDATE

The motion of petitioner, United Air Lines, Inc., for reconsideration of the Order of September 11, 1980, deny-

ing a petition for writ of mandate in the above-entitled matter, having been heard on October 9, 1980, the parties being represented by counsel, and good not cause having been shown,

IT IS HEREBY ORDERED that the Motion for Reconsideration of Order Denying Writ of Mandate be, and the same hereby is, denied in all respects.

Dated: October 24, 1980.

IRA A. BROWN, JR.
Judge of the Superior Court

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Superior Court of California

City and County of San Francisco

No. 747-454

United Air Lines, Inc.
Petitioner,

vs.

The Occupational Safety and Health Appeals Board,
Respondent,

The Division of Occupational Safety and Health,
Real Party in Interest.

[Filed Oct. 27, 1980]

JUDGMENT DENYING PEREMPTORY WRIT OF MANDAMUS

This matter came regularly before this Court on May 19, 1980, and June 30, 1980, for hearing. Paul M. Tschirthart

appeared as attorney for Petitioner; Robert A. Heron appeared as attorney for Respondent; and Michael D. Mason appeared as attorney for Real Party in Interest. The record of the administrative proceedings having been received into evidence and examined by the Court, the Court having taken judicial notice of the September 27, 1977, letter from the Honorable John L. Burton, Chairman, Subcommittee of the Committee on Government Operations, House of Representatives, United States Congress, and the October 14, 1977, response from the Honorable Langhorne Bond, Administrator, Federal Aviation Administration, no additional evidence having been received by the Court, arguments having been presented, and the Court having issued its minute order, which was signed and filed on September 11, 1980,

IT IS ORDERED that:

1. The petition filed in this action for a peremptory writ of mandamus is denied; and

2. The alternate writ of mandamus issued in this action on December 29, 1978, is discharged; and

3. Petitioner shall take nothing by this action; and

4. Respondent shall recover its costs in this action in the amount of $308.30.

Dated: October 24, 1980.

/s/ IRA A. BROWN, JR.
Judge of the Superior Court
City and County of
San Francisco

Before the
Occupational Safety and Health Appeals Board
Department of Industrial Relations
State of California
Docket No. 77-R1D3-658

In the Matter of the Appeal of:
United Airlines
San Francisco International Airport
San Francisco, California 94128
Employer.

DECISION
JURISDICTION

I

This matter came on regularly for hearing before Robert L. Harvey, Presiding Administrative Law Judge of the California Occupational Safety and Health Appeals Board, at San Francisco, California, on December 2, 1980, at 9:00 a.m. The Employer was represented by Linda S. Puvogel, Attorney. The Division of Occupational Safety and Health (the Division) was represented by Ruth M. Friedman, Staff Counsel. Robert Anderson appeared on behalf of Local 1781, International Association of Machinists. Oral and documentary evidence was introduced at the hearing; and the parties requested and were granted leave until January 5, 1981, to file written briefs, at which time the matter was submitted.

II

On June 10, 1977, and June 22, 1977, W. R. Klemens, Compliance Safety Engineer of the Division, conducted an inspection at the San Francisco International Airport, San Francisco, California (the site). On June 27, 1977, the Division issued to the Employer Citation No. 1 alleging a general violation of Title 8, California Administrative Code, Section 3666(a). A proposed civil penalty was not assessed by the Division.

III

The Employer has filed a timely appeal from the Citation contesting the existence of the alleged violation and the jurisdiction of Cal/OSHA.

LAW AND MOTION

1. At the hearing, the Division moved, without objection, to amend the charged section number from 8 Cal. Adm. Code 3666(a) to 8 Cal. Adm. Code 3339(a). This motion was granted.

2. At the hearing, the Employer moved, without objection, to withdraw its appeal as to the existence of the alleged violation. This motion was granted, leaving in issue the jurisdiction of Cal/OSHA.

JURISDICTIONAL ISSUE

Summary of Evidence

The unchallenged violation of 8 Cal. Adm. Code 3339(a) deals with LD-3 cargo containers used to handle cargo in aircraft. The described hazard involved damage to the doors of the LD-3 cargo containers. The employees of the Employer were exposed to the hazard while handling the

containers on the ground under a contract arrangement with Philippine Airlines (PAL).

The Employer's Director of Ground Safety, Wilson Applegate, testified that the Employer prepares and submits manuals to the Federal Aviation Administration (FAA), and that such manuals contain instructions and information relating to the safety of employees. Employee safety information in the manual relates directly to LD-3 cargo containers. Standards are established for the containers, and action is specified if a container does not meet the standards. The manuals have been prepared and maintained pursuant to FAA regulations requiring the manuals, and the FAA has reviewed and accepted the manuals. The manuals are not given to each employee but are on microfilm and are available to employees. Mr. Wilson testified that there are at least two FAA inspectors assigned to the Employer's maintenance base and two inspectors assigned to the terminals.

Evidence presented described the Employer's efforts to correct the damaged LD-3 containers. On July 27, 1977, the FAA issued a letter to the Employer stating that a July 15, 1977, inspection had revealed four unserviceable containers, and that corrective action was required. The Division put into evidence a memo of a call from the Employer's attorney to Mr. Mayfield, FAA Principal Operations Inspector, asking the FAA for help in putting pressure on PAL to repair the containers. The memo states:

> "The main reason being that California OSHA has issued United a citation because the LD-3s are in the United ramp area and OSHA considers it to be a United Airlines' problem. United has advised CAL/

OSHA that it falls under the jurisdiction of the FAA because they are type certificated containers and considered part of airplane equipment, and I agree."

The Division produced evidence that an employee had submitted a formal complaint regarding faulty cargo container door hinges in December, 1975, and that nothing was done to eliminate the hazard until after the Division's inspection in June, 1977, although some of the containers had been taken out of service by the Employer. Two employees during the period in issue testified that they had not observed an FAA inspector conducting an employee safety inspection.

Findings and Reasons for Decision

The FAA did not exercise safety and health jurisdiction pursuant to Labor Code Section 6303(a) regarding the violation of 8 Cal. Adm. Code 3339(a).

CAL/OSHA properly exercised safety and health jurisdiction regarding the loading and ground movement of LD-3 cargo containers.

The Employer contends that § 605(a) of the Federal Aviation Act, 49 U.S.C. § 1301, et seq., preempted the entire field of safety by the granting of exclusive jurisdiction to the FAA. Examination of the Act does not support this contention. As pointed out by the Division, § 601 of the Act, 49 U.S.C. § 1421(a), deals with flight safety and air commerce as the areas the FAA is authorized to regulate on an exclusive basis. Although the LD-3 cargo containers involved in this case were utilized by PAL in flight, the hazard described was a ground hazard. No evidence presented indicated that the elimination of the hazard would have any impact (adverse or otherwise) upon flight operations.

The Division also points out that the jurisdiction of the FAA is not totally exclusive in all matters affecting air commerce as evidenced by 49 U.S.C. § 1301, et seq., and 45 U.S.C. § 151, et seq., which grants jurisdiction in described areas to the Civil Aeronautics Board and handling of labor management relations under the Railway Labor Act. The Federal Occupational Safety and Health Act and the related California Occupational Safety and Health Act are examples of later enacted legislation specifically aimed at a later recognized mandate to insure the health and safety of employees where such objectives have not been effectively dealt with.

The evidence presented established that employee safety is merely included in a manual that appears to primarily relate to air safety. There is no adequate indication in the FAA manual requirements that ground safety of employees be dealt within the required manuals. Additionally, the basis of the assertion by the FAA representative that the FAA has safety jurisdiction was predicated upon the fact that he considered the cargo containers to be part of the airplane equipment and ignored the fact that the exposure to the hazard in this case did not relate directly to flight operations. The ground operations, which constituted the exposure to the identified hazards, were clearly not directly related to flight operations. Additionally, the evidence established the cargo containers were used in flight only by PAL (which may be assumed to be a foreign airline) and not this Employer, which had only ground-handling operations pursuant to a contract agreement.

The Employer contends that the FAA was actively exercising jurisdiction within the meaning of Labor Code

§ 6603. The facts of this case do not support this contention. The manual, which was prepared by the Employer, was not shown to contain any minimum standards relating to employee safety and only deemed approved by the absence of any adverse comment by the FAA review. The testimony by the employee that direct action to cure the hazards that he had complained of in 1975 were only responded to after Cal/OSHA made its inspection do not support the contention of active or effective FAA employee safety jurisdiction and enforcement. Additionally, the July, 1977, inspection by the FAA appears to have been in response to the Employer's request for assistance. It is difficult to conclude that an effective safety and health program for employees is one in which an employer must ask the regulatory agency to conduct an inspection so that the employer would have a valid reason to prevent its employees from being exposed to a hazard.

The Federal OSHA Review Commission case of *Northwest Airlines,* OSHRC Docket No. 13649 (appeal pending), has been noted; but, in addition to the dissimilar factual situation, the case holding is contra to a previous decision of the Appeals Board (*United Airlines,* Docket No. 76-878, November 27, 1978) and other airline jurisdiction cases from this agency.

For the reasons set forth above, it is concluded that Cal/OSHA engaged in a valid exercise of jurisdiction, and such jurisdiction was not limited or invalidated by any vesting or exercise of safety and health jurisdiction by the FAA.

Decision

The appeal is denied.

/s/ ROBERT L. HARVEY
Presiding Administrative
Law Judge

RLH:en
Dated: February 4, 1981

United States Court of Appeals
For the Ninth Circuit
No. 79-4489

United Air Lines, Inc.
Plaintiff-Appellee,

vs.

The Division of Industrial Safety of the Department of Industrial Relations of the State of California and the Occupational Safety and Health Appeals Board for the State of California,
Defendants-Appellants.

On Appeal From the United States District Court
For the Northern District of California

OPPOSITION OF UNITED AIR LINES, INC. TO MOTION FOR A STAY PENDING APPEAL

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III

APPELLANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS

This action involves an analysis of the duties and responsibilities of the Federal Aviation Administration ("FAA") under the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301, *et. seq.* ("Aviation Act"), and the effect which the carrying out of those duties and responsibilities has on the jurisdiction of CAL/OSHA, under its organic statute, the California Labor Code §§ 148-149, 6300 *et. seq.* It is not a case of Federal pre-emption; it is a case of statutory pre-emption since the law requires that the proper exercise of FAA jurisdiction precludes the continuing exercise of CAL/OSHA jurisdiction in the same "place of employment."

A. CAL/OSHA Is Without Safety and Health Jurisdiction Over United's Operations and Maintenance Facilities

1. CAL/OSHA Has No Jurisdiction Where A Federal Agency Is Otherwise Empowered To Act.

The federal Occupational and Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, preempts state regulation

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[4]CAL/OSHA has requested that this Court take judicial notice of certain testimony concerning the FAA's jurisdiction. United objects to the propriety of adding to the record before this Court and also submits that these materials have been taken out of context and are not properly within Rule 201 of the Federal Rules of Evidence. Nevertheless, the FAA's position is discussed, *infra.* it is entitled to a stay.

United States Court of Appeals
For the Ninth Circuit
No. 79-4489

United Air Lines, Inc.
Plaintiff-Appellee,

vs.

The Division of Industrial Safety of the Department of Industrial Relations of the State of California and the Occupational Safety & Health Appeals Board for the State of California,
Defendants-Appellants.

On Appeal From the United States District Court
For the Northern District of California

BRIEF OF PLAINTIFF-APPELLEE UNITED AIR LINES, INC.

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paragraph 2 of United's Verified Complaint, (CR. 1). Jurisdiction asserted under 28 U.S.C. §§ 1331 and 1337 is challenged herein by appellants.[5] The standards for determining whether a federal question is involved are essentially the same under both statutes, although 28 U.S.C. § 1337 jurisdiction depends on the case "arising under any Act of Congress regulating commerce". The instant action clearly presents a predominant federal question as well as one which arises under a federal statute which regulates commerce, i.e., The Federal Aviation Act.

The application of the exemption provision of the CAL/OSHA statute depends entirely on interpretation of federal law. If the Federal Aviation Act provides safety and health jurisdiction to the FAA and the FAA exercises that jurisdiction,[6] CAL/OSHA is without concurrent authority under the exemption terms of its own statute. No interpretation of state law is necessary.

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[5]United mistakenly asserted jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship) but no longer relies on that section.

[6]Even negative exercise of its jurisdiction serves to deprive CAL/OSHA of jurisdiction. See *Secretary of Labor v. Consolidated Rail Corp.* OSHRC Docket No. 78 5805, CCH OSHA Paragraph 23,363 (1979) in which the Federal Railroad Administration declined to require guardrails around service pits and the Occupational Safety and Health Review Commission ("OSHRC") held that such non-action was sufficient to oust FED/OSHA of jurisdiction.

U.S. Department of Labor

Occupational Safety and Health Administration
Washington, D.C. 20210

Nov. 11, 1977

OSHA Program Directive # 77-5

OSHA Instruction
October 30, 1978

To: Regional Administrators
Assistant Regional Administrators

Through: Donald E. MacKenzie, Field Coordinator

From: Richard P. Wilson

Subject: Reference Book on Jurisdictional Issues

1. Purpose. The purpose of this directive is to replace Field Information Memoranda #75-39, #75-39A, #75-39B which transmitted copies of the "Reference Book on Jurisdictional Issues" and amendments thereto. The content of the FIM's has been combined and updated to reflect current conditions.

2. Program Directives Affected. Field Information Memoranda #75-39, #75-39A, #75-39B are replaced by this directive. Since sufficient copies of the Reference Book have been previously transmitted, only an updated Table of Contents and one new Interagency Agreement are provided as attachments to this directive.

3. Background. It is OSHA's position that a State has jurisdiction in occupational safety and health issues that are not specifically excluded in its approved plan. The State has the same scope of authority and responsibility for exercising that jurisdiction as would OSHA were the

plan not in effect. In carrying out their enforcement responsibility States may encounter problems involving two types of jurisdictional questions.

The first and more prevalent problem involves questions of whether OSHA has jurisdiction under Section 4(b)(1) of the Act. Section 4(b)(1) excepts from OSHA application those particular working conditions over which other Federal agencies have exercised their statutory authority by promulgating enforceable occupational safety and health standards applicable to those particular working conditions (hazards). Approved States are expected to exercise jurisdiction over all working conditions unless another Federal agency is clearly exercising its authority.

Section B, Jurisdictional Interpretations, of the Reference Book contains documents that present OSHA's interpretations of where jurisdiction lies in relation to certain Federal agencies. Where appropriate, States should use these documents for guidance in determining the extent of OSHA jurisdiction. States are free to honor these Federal limitations on OSHA's jurisdiction as State limitations. However, Section 4(b)(1) limitations are strictly binding only on the Federal program. Therefore, a State may choose to exercise greater jurisdiction under its own law than is allowed to Federal OSHA. Any maximum limitation on State jurisdiction would be determined under the State law and other Federal law and applicable court decisions.

(In a related development, the Consumer Product Safety Commission, the Environmental Protection Agency, the Food and Drug Administration and OSHA have recently entered into an interagency agreement with the goal of

increased cooperation in standards setting, enforcement, training, etc. A copy of this agreement is attached.)

The second jurisdictional problem involves the question of "exclusive Federal jurisdiction" over private contractors on certain Federal properties. In this situation there is not a question of whether OSHA or another Federal agency has jurisdiction, but whether OSHA may pass its jurisdiction on to a State through an approved State plan. Exclusive jurisdiction exists on certain limited Federal property where such jurisdiction has been reserved by the Federal government or ceded by the State to the Federal government. In such cases specific Congressional action would be required to permit State regulation of private employers working on these Federal properties. While it has been OSHA's position that the necessary Congressional action was taken through the enactment of Section 2(b)(11) and 18 of the Act, whereby States were invited to cover the same class of employers as the Federal program, a recent Federal district court decision in Minnesota has challenged this interpretation.

4. Action.

a. In any case where a State inspector is denied entry on the basis of a 4(b)(1) jurisdictional question, the State should pursue entry in one of the following ways:

1. A State may seek a court order enforcing its right of entry. In this case the Region should be notified of the State action and kept informed of the progress of the suit. OSHA will provide legal advice if requested by the State.

2. A State may take advantage of the Federal procedure for determining jurisdiction under Program Directive

#200-2, "Handling Jurisdictional Complaints . . ." contained in Section A2 of the Reference Book. States choosing this alternative should contact the Regional Office to initiate action under the Federal procedure.

b. In cases involving claims of exclusive Federal jurisdiction over private contractors on Federal property (military bases, national parks, etc.), Program Directive #77-6, "Application of State Safety and Health Provision to Private Employers in Areas of Exclusive Federal Legislative Jurisdiction," should be referred to for specific directions. That directive should be incorporated into Section A3 of the Reference Book.

c. The attached CPSC/EPA/FDA/OSHA agreement is provided for information and should be added, as Section C-9, to the Reference Book.

d. Regional Administrators should assure that State designees have received copies of this updated directive as well as Program Directive #77-6 and should assist them with any specific problems.

5. Filing. This Directive is effective immediately and remains in in effect until further notice.

Attachments:

Table of Contents
Interagency Agreement (C9)

Originator: OCS

Distribution:

A-1, B-2, C-2, D-4 and 5, E-1, HEW-1, NIOSH Regional Program
Directors-1, NACOSH-1, Training Institute-4

Before the
Occupational Safety and Health Appeals Board
Department of Industrial Relations

State of California

Docket No. 76-R1D3-878

In the Matter of the Appeal of:

United Airlines—SFOCG
San Francisco International Airport
San Francisco, California 94128
Martin A. Soll, Attorney at Law
Petitioner.

GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

The Occupational Safety and Health Appeals Board, acting pursuant to authority vested in it by the California Labor Code, hereby grants the Petition for Reconsideration filed by the Petitioner, and makes the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

On June 16 and 17, 1976, a representative of the Division of Industrial Safety (the Division) conducted an inspection of a place of employment at San Francisco International Airport, San Francisco, California. As a result of this inspection, a citation was subsequently issued to Petitioner

herein, United Airlines—SFOG, for an alleged violation of Title 8, California Administrative Code, Section 3642(a)(1). A proposed civil penalty of $110 was issued to Petitioner on July 27, 1976.

Petitioner filed a timely appeal with the Appeals Board contesting the citation and the civil penalty. The matter was docketed for hearing, and on November 3, 1976, the hearing was conducted in San Francisco, California. The appeal was submitted for decision on December 23, 1976, after the submittal of closing briefs. On January 24, 1977, the Administrative Law Judge issued a decision denying the appeal in its entirety. On January 28, 1977, a corrected decision was issued by the Administrative Law Judge.

On March 1, 1977, Petitioner filed a timely Petition for Reconsideration with the Appeals Board which was taken under submission by the Appeals Board on March 4, 1977. On March 14, 1977, the Division filed an Answer to the Petition for Reconsideration.

ISSUE

The Division issued Petitioner a citation alleging a violation of a safety order with respect to lack of guardrail protection for an employee performing work on an aircraft engine. The only issue is whether the Division's jurisdiction to issue the citation has been precluded by the vesting of such jurisdiction in the Federal Aviation Administration (FAA).

REASONS FOR DECISION
AFTER RECONSIDERATION

The violation allegedly occurred while a United employee was performing a borescope inspection on a DC-10 airliner in the ramp area at the San Francisco International Airport. Petitioner maintains that the State's jurisdiction is preempted by the FAA for the following reasons:

1. The safety jurisdiction of airline employees, including aircraft ground maintenance employees, is vested in the FAA. Labor Code Section 6303(a); 29 U.S.C. 651, 653; *The Federal Aviation Act of 1958,* 49 U.S.C. 301, et seq.

2. It is not necessary that the FAA actually exercise its authority in matters of airline employee safety including aircraft maintenance personnel. It is sufficient that the FAA is vested with such power to preclude State jurisdiction.

3. Even if the FAA is required to exercise its authority in order to preempt the State, it has fulfilled any such requirement by issuing regulations with respect to aircraft maintenance, including safety of ground maintenance personnel. These regulations require airlines to submit maintenance manuals to the FAA which must include other information or instructions relating to safety. (14 C.F.R. 121.135(b).)

4. Matters relating to the size of maintenance manuals, how they are approved, what approved methods are employed, or even the manner of enforcement by the FAA, are all irrelevant to the question of "exercise."

As to Petitioner's first two points, the Appeals Board has applied, and continues to apply, a jurisdictional test as to whether another State or Federal agency is actually exercising safety jurisdiction in a given circumstance before the State's safety authority is declared preempted. (*Southern Pacific Transportation*, Cal/OSHA Docket Nos. 74-R2D3-193, 194, 195, and 74-R3D1-393, Decision After Reconsideration, October 28, 1975.) Although we acknowledge that this may be contrary to the trend of recent Federal OSHA cases, our reading of both Federal and State law indicates that both Congress and the Legislature intended that if employees were to be exempted from OSHA or Cal/OSHA protection, they should not be left with a mere token or recital of safety protection. Hence, the "actually exercising" test is applied with regard to State or Federal agencies vested with employee safety responsibility.

Evidence in this case was presented that FAA regulations require air carriers like Petitioner to submit maintenance manuals for approval which must include other information or instructions relating to safety. In fact, a copy of United's maintenance manual had a provision similar to the section cited. The FAA may disapprove of a manual in whole or in part, but no specific guidance regarding employee safety provisions or their enforcement are provided by the FAA; and, approval is assumed by the FAA's failure to disapprove.

In regard to the enforcement of employee safety requirements, Petitioner presented evidence that FAA representatives inspect its facilities and operations; and, reportedly,

an inspector may take action for possible violation of employee safety requirements contained in the manual. The evidence failed, however, to show that the FAA actually does exercise such authority in matters affecting employee safety. In fact, without convincing evidence to the contrary, the Division's contention that the FAA exercises safety jurisdiction as to the aircraft itself, passengers, and cargo, but not employee safety, is supported by the evidence presented.

Accordingly, the Division properly exercised safety jurisdiction in issuing Petitioner a citation for failure to adequately protect an employee on an elevated work platform from a fall based on the lack of evidence that the FAA actually exercised employee safety jurisdiction in such circumstances.

DECISION AFTER RECONSIDERATION

The Decision of the Administrative Law Judge in this matter dated January 24, 1977, is affirmed.

/s/ HAROLD MITCHELL
Chairman

/s/ MARK K. BOWERS
Member

Occupational Safety and Health Appeals Board

Nov. 27, 1978

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No. 80-1494

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED AIR LINES, INC., PETITIONER

v.

THE DIVISION OF INDUSTRIAL SAFETY OF THE DEPARTMENT OF INDUSTRIAL RELATIONS OF THE STATE OF CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

1. The Division of Occupational Safety and Health, formerly the Division of Industrial Safety (see Br. in Opp. 1), of the Department of Industrial Relations of the State of California ("Cal/ OSHA") conducts an occupational safety and health enforcement program pursuant to the California Occupational Safety and Health Act of 1973, Cal. Lab. Code §§ 60.5-60.9, 6300 *et seq.* (West Cum. Supp. 1981) ("Cal/OSH Act"). Under Section 18(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 667(c), states may operate their own occupational safety and health programs, if approved by the Occupational Safety and Health Administration ("OSHA"). The Cal/OSHA program, which has

been approved by OSHA, applies to all places of employment in California "except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than [Cal/OSHA]." Cal. Lab. Code § 6303(a) (West Cum. Supp. 1981).[1]

Petitioner, an air carrier, maintains operations and maintenance facilities in San Francisco, California. Cal/OSHA has conducted several inspections at those facilities and has issued citations for violations of the Cal/OSH Act with respect to hazards affecting petitioner's maintenance personnel. Cases involving these citations have been and are being heard by the California Occupational Safety and Health Appeals Board ("Appeals Board"), the independent tribunal with responsibility for adjudicating employer contests of Cal/OSHA citations, and by the California state courts, which review decisions of the Appeals Board.

Petitioner commenced this action on May 7, 1979, in the United States District Court for the Northern District of California. Relying on Cal. Lab. Code § 6303(a), petitioner sought declaratory and injunctive relief against further Cal/OSHA inspections and citations, as well as against further Appeals Board proceedings. Specifically, petitioner claimed that the Federal Aviation Administration has health and safety jurisdiction over petitioner's workplace under the Federal Aviation Act of 1958, 49 U.S.C. 1301 *et seq.*, and that FAA has "actively exercised" that jurisdiction, within the meaning of § 6303(a) of the Cal. Lab. Code,

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[1] The Occupational Safety and Health Act of 1970 contains an analogous, but somewhat different provision. Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), provides that:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

by conducting inspections and taking other enforcement actions with respect to petitioner's workplace (Pet. App. 14a-23a). Cal/OSHA moved to dismiss petitioner's complaint on several grounds, including lack of subject matter jurisdiction, failure to exhaust administrative remedies, and abstention.

On July 26, 1979, the district court granted a preliminary injunction against the enforcement of the Cal/OSH Act by Cal/OSHA and the Appeals Board with respect to petitioner's workplace (Pet. App. 43a-47a). Cal/OSHA subsequently moved in the court of appeals to stay the injunction pending appeal; that motion was granted on January 25, 1980. Thereafter, on December 2, 1980, the court of appeals held that petitioner's complaint should be dismissed because the district court lacked subject matter jurisdiction under either 28 U.S.C. 1331 or 28 U.S.C. 1337 (Pet. App. 48a-53a). In support of its decision, the court of appeals noted that petitioner's case was clearly based upon a state statute, Cal. Lab. Code § 6303(a), and held that the essential state law nature of the case was not changed simply because this state statute refers broadly to other state and federal statutes, including the Federal Aviation Act of 1958. This reference was insufficient, in the court's view, to sustain petitioner's contention that its claim was based on federal law. Moreover, petitioner's invocation of federal law, the court held, was in the nature of a defense to threatened or pending state administrative or judicial action and, as such, cannot supply a proper basis for federal jurisdiction.

2. The United States does not believe that this case presents any issue warranting further review. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals.

The court of appeals correctly held (Pet. App. 51a) that, although this case may involve questions concerning the interpretation of the Federal Aviation Act of 1958, the case

does not arise under that statute within the meaning of 28 U.S.C. 1331 or 28 U.S.C. 1337.[2] As this Court has stated, "[n]ot every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gully* v. *First National Bank*, 299 U.S. 109, 115 (1936). Here, petitioner's action is based on a state statute, Cal. Lab. Code § 6303(a), which provides that Cal/OSHA does not have jurisdiction over a place of employment where health and safety jurisdiction "is vested by law in, and actively exercised by, any state or federal agency other than" Cal/OSHA. Although § 6303(a) makes reference to federal law, such as the Federal Aviation Act of 1958, that alone is insufficient to establish federal question jurisdiction. See *Moore* v. *Chesapeake & Ohio Ry.*, 291 U.S. 205, 213-217 (1934); 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3563, at 417-418 (1975). Indeed, FAA regulatory authority is relevant here only as an anticipated defense to efforts by the state agency to enforce state law in the state courts. The federal courts lack jurisdiction in such circumstances. See *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237, 248 (1952) ("Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to

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[2]Because it found no basis for federal jurisdiction here, the court of appeals did not address the additional grounds for dismissal raised by respondents, the abstention and exhaustion doctrines. See page 3, *supra*; Pet. App. 53a. Although the court of appeals did not rely on the abstention doctrine, that doctrine also supports the judgment below because petitioners established no great or immediate irreparable harm warranting interference with on-going state proceedings. See *Moore* v. *Sims*, 442 U.S. 415 (1979); *Younger* v. *Harris*, 401 U.S. 37 (1971). Likewise, petitioner established no ground for dispensing with the requirement that it exhaust its administrative remedies. See *Baldwin Metals Co.* v. *Donovan*, 642 F. 2d 768 (5th Cir. 1981); *Marshall* v. *Burlington Northern, Inc.*, 595 F. 2d 511 (9th Cir. 1979); *In re Worksite Inspection of Quality Products, Inc.*, 592 F. 2d 611 (1st Cir. 1979); *Marshall* v. *Northwest Orient Airlines, Inc.*, 574 F. 2d 119, 122 (2d Cir. 1978).

federal court to begin his federal-law defense before the state court begins the case under state law"); *Home Federal Savings & Loan Ass'n* v. *Insurance Department of Iowa*, 571 F. 2d 423 (8th Cir. 1978).

Petitioner attempts to avoid these well-established principles by now claiming (Pet. 5, 7-10), for the first time in this litigation,[3] that Cal/OSHA's jurisdiction is derived from the federal OSH Act and is therefore limited by the parallel provision of the federal law (Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1)) that addresses the question of conflicts between OSHA's authority and the authority of other federal agencies. See note 1, *supra*. Even if petitioner's claim were well-founded, it would provide no rebuttal to the court of appeals' reasoning that this action merely anticipates federal issues that petitioner may raise as a defense to the enforcement of state law in the California courts.

At all events, petitioner misperceives the nature of the federal-state relationship under the federal OSH Act. Under Section 18 of the OSH Act, 29 U.S.C. 667, a state is preempted from regulating with respect to matters covered by federal OSHA standards unless the state has adopted a federally approved plan. States that have adopted federally approved plans are free to conduct regulatory programs relating to occupational safety and health, subject to the maintenance of a federal enforcement presence during the initial phases of such plans. However, Section 18 does not confer federal power on the states; the Section merely removes federal preemption so that the states may exercise their sovereign powers over occupational safety and health. Cf. *Farmer* v. *Local 25, Carpenters*, 430 U.S. 290, 302-303 (1977); *United States* v. *Lanza*, 260 U.S. 377, 381 (1922). Thus, the limitations imposed on OSHA by Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), are not imported into

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[3]Indeed, as respondents point out (Br. in Opp. 7-8, 11-12), petitioner expressly disclaimed reliance on this ground in the court of appeals.

state law, as is evident from the language of the OSH Act. Under Section 18 of the OSH Act, 29 U.S.C. 667, states with approved plans are not prohibited from maintaining coverage that is more extensive or standards that are more stringent than those developed by OSHA.[4] With respect to the promulgation and enforcement of standards, the states are required only to be at least as effective as OSHA. See Section 18(c)(2) of the OSH Act, 29 U.S.C. 667(c)(2). Thus, a state may provide an exemption from coverage narrower than that provided by Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1), unless such a narrower state exemption would conflict with another federal statute. Indeed, for purposes of compliance with Section 18, a state program need not have any exemption analogous to that provided by Section 4(b)(1) of the OSH Act. See OSHA Program Directive No. 77-5 (Oct. 30, 1978).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

JULY 1981

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[4]An exception to this rule exists for standards that apply to products distributed or used in interstate commerce, but it is not claimed that this exception is relevant here.

[5]As the court below pointed out (Pet. App. 51a), the Cal/OSH Act analogue to Section 4(b)(1) may indeed be narrower than Section 4(b)(1) of the OSH Act, 29 U.S.C. 653(b)(1). Cal. Lab. Code § 6303(a) exempts an employer only if another agency "actively exercise[s]" its authority. Thus, an administrative law judge of the California Appeals Board recently rejected a § 6303(a) claim advanced by petitioner in another action, on the ground that, among other things, the FAA had not enforced its requirements. *In re United Airlines*, Docket No. 77-R1D3-658 (Feb. 4, 1981).

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vs.

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Respondent.

REPLY OF PETITIONER UNITED AIR LINES, INC. TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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Respondent.

REPLY OF PETITIONER UNITED AIR LINES, INC. TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Petitioner United Air Lines, Inc. (hereinafter "United") herein responds to the memorandum submitted by the Solicitor General for the United States (hereinafter "Solicitor General") as *amicus curiae* which opposes United's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

This is a unique case in which United seeks to determine the statutory line of demarcation between the federal jurisdiction of the Federal Aviation Administration ("FAA") and the state jurisdiction of California's equivalent of the Federal

Occupational Safety and Health Administration, the California Department of Industrial Relations, Division of Industrial Safety,[1] and the Occupational Safety and Health Appeals Board (collectively, "CAL/OSHA"). The measurement of that jurisdiction depends entirely on the scope of actively exercised FAA jurisdiction under the Federal Aviation Act of 1958, 49 U. S. C. §§ 1301 *et seq.* The California legislature recognized that dependency in restricting CAL/OSHA's jurisdiction to those "places of employment" not within the FAA's actively exercised jurisdiction. California Labor Code § 6303a.[2]

The issue before the Court is whether the Appellate Court erred in failing to find that a federal question was stated in United's complaint for declaratory and injunctive relief from pervasive and unlawful regulation of its facilities by CAL/OSHA. United submits that a federal question is implicit in the circumstances in which this case arose and was explicitly set forth in the complaint.

This reply will focus briefly on two assertions by the Solicitor General:

1. That United's complaint stated a federal question only as an anticipated defense to the enforcement of state laws; and

2. That section 18 of the Occupational Safety and Health Act ("OSH Act"), 29 U. S. C. § 667, authorizes a state to exercise jurisdiction which the OSH Act would deny to the Federal Occupational Safety and Health Administration ("FED/OSHA").

Neither of these assertions by the Solicitor General is correct.

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[1] This Division is now known as the Division of Occupational Safety and Health.

[2] The ultimate question in this case is whether or not the FAA has and exercises statutory authority over the safety of an airline's ground employees while performing maintenance on aircraft or aircraft components. That question was not reached by the Ninth Circuit because it found federal question jurisdiction to be lacking.

I.

THE NINTH CIRCUIT AND NOW THE FEDERAL GOVERNMENT ERRONEOUSLY CHARACTERIZE UNITED'S ACTION AS RAISING A FEDERAL QUESTION ONLY AS AN ANTICIPATED DEFENSE TO CAL/OSHA ENFORCEMENT

It is obvious that any desired result can be supported merely by manipulating the facts. Characterizing United's action as merely a defense to enforcement is factually inconsistent with the complaint. This action for declaratory and injunctive relief from unlawful regulation is far more comprehensive than merely a defense to any particular enforcement.

United's verified complaint (Appendix pp. 14a-24a)[3] sought exemption for its maintenance and operations facilities from CAL/OSHA's entire regulatory process, i.e. from the "regular and repeated inspection, regulation and attempts at enforcement" of CAL/OSHA's purported authority under California Labor Code, §§ 148-49, 6300 *et seq.* This suit represents a serious effort to harmonize the scope of CAL/OSHA's regulation with that of FED/OSHA's in the face of exercised FAA jurisdiction over the actual day-to-day activities at United's operations and maintenance facilities.

If United is correct in its construction of the scope of jurisdiction exercised by the FAA,[4] CAL/OSHA's repeated assertion of its jurisdiction is beyond its authority and subject to injunctive relief. Under CAL/OSHA's own oganic statute, its

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[3] The reference is to the Appendix filed as part of United's Petition for Writ of Certiorari.

[4] Recent decisions of the Federal Occupational Safety and Health Review Board are in accord with United's view of FAA authority. *Northwest Airlines, Inc.*, 1980 CCH OSHD para. 24,751 (1980); *American Airlines, Inc.*, 1981 CCH OSHD para. 25,225 (1981). See *infra*.

jurisdiction and authority are entirely dependent on the breadth of jurisdiction given to the FAA by an Act of Congress, and actively exercised by that agency. Thus, by this action United is not defending against any particular enforcement proceedings; rather, it is seeking declaratory and injunctive relief from any improper exercise of jurisdiction by CAL/OSHA in those "places of employment" where such jurisdiction is exercised by the FAA.

II.

CAL/OSHA'S JURISDICTIONAL LIMITS CANNOT EXCEED FED/OSHA'S

United has argued in its Petition for Writ of Certiorari that CAL/OSHA's jurisdiction cannot be broader than FED/OSHA's since: (1) the OSH Act effectively preempted all state authority in the field of employee safety and health subject to the potential resumption of such responsibility pursuant to a federally approved plan, 29 U. S. C. § 667, and (2) the requirement that approved state plans impose standards which are at least as effective as federal standards cannot be read to expand the effective jurisdiction of the state agency beyond that provided by the OSH Act from which it is spawned. By the express language of the federal statute, FED/OSHA may not exercise its authority where, as here, another federal agency (FAA) has jurisdiction. 29 U. S. C. § 653(b)(1).

The Solicitor General now argues that the effect of 29 U. S. C. § 667 is merely to "remove the federal preemption so that states may exercise their sovereign powers over occupational safety and health". Memorandum for the United States, p. 5. It is astounding that the Solicitor General should endorse an interpretation of the federal statutory scheme which would permit the exercise of FAA authority over employee safety and health to have a different jurisdictional effect in each state based solely on whether the OSH Act or the state's own approved

plan governs the regulation of employee safety and health.[5] If such a view were upheld, Northwest Airlines and American Airlines, like United, would have different safety and health regulatory obligations in California than in other states despite the clear decisions of the Occupational Safety and Health Review Commission in *Northwest Airlines, Inc.*, 1980 CCH OSHD, para. 24,751[6] and *American Airlines, Inc.*, 1981 CCH OSHD, para. 25,225 (February 27, 1981), which rejected FED/OSHA's jurisdiction in airplane service and hangar areas. Yet, in both the *Northwest* and *American* cases, FAA safety and health jurisdiction over airline employees performing aircraft maintenance was held to be statutorily based and actively exercised through the FAA's manual requirements. No practical scheme of federalism should countenance differing preemptive effects caused by the same FAA exercise of jurisdiction in different states.

Finally, both Respondent and the Solicitor General assert that United disclaimed reliance on a federal preemption argument before the U. S. Court of Appeals. Petitioner's Brief in Opposition, 7-8, 11-12, Memorandum of the United States, 5 n.3. That assertion suggests a callous misreading of United's position before the Ninth Circuit. There, United did not need to argue an implied federal preemption because CAL/OSHA's own statute clearly recognized such a preemptive effect where the FAA actively exercised its jurisdiction.[7] Thus, as between

[5] The Solicitor General even goes so far as to claim that a state program need not provide for any exemption to preclude dual regulatory jurisdiction, a proposal clearly at odds with the legislative intent of the OSH Act.

[6] The decision in *Northwest Airlines, Inc.*, is set out in the Appendix to United's petition for writ of certiorari at pp. 54a-84b.

[7] The FAA has long preempted the field of aviation safety under 49 U. S. C. § 1421. Whether employee safety while performing aircraft maintenance is within the scope of the FAA's authority is, of course, one of the principal issues in United's suit although the Ninth Circuit found no federal question in the complaint.

CAL/OSHA and the FAA, the state statute itself provides an exemption. California Labor Code § 6303(a). Accordingly, United's argument for reversal of the Ninth Circuit by this Court is based on both (1) the statutory exemption automatically triggered by the preemptive exercise of FAA jurisdiction and (2) the federal preemption by FED/OSHA of the authority of all state agencies with regard to employee safety and health, which preemption is complete and comprehensive except for, and only to the extent of, FED/OSHA's subsequent approval of a state plan. Thus, on the one hand, United has not seen the need to argue for federal preemption by the FAA with respect to CAL/OSHA because of the state statute. On the other hand, United has expressly argued that federal preemption by FED/OSHA with respect to matters of safety and health necessarily determine the limits of CAL/OSHA's authority. It is CAL/OSHA's derivative authority which cannot exceed the authority of FED/OSHA. United submits that the statutory exemption from CAL/OSHA regulation caused by the exercise of FAA jurisdiction cannot lawfully be narrower than the statutory exemption from FED/OSHA regulation caused by the same exercise of FAA jurisdiction in other states.

WHEREFORE, petitioner United Air Lines, Inc. prays that its petition for a writ of certiorari, filed March 2, 1981, be granted.

Respectfully submitted,

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